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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above-entitled case.

Opinions Below

A written opinion was rendered in the trial court, the Circuit Court of Spotsylvania County, Virginia (R. 286). The Supreme Court of Appeals of Virginia, in rejecting a petition for writ of error and affirming the judgment of the Circuit Court (R. 330), adopted the opinion of the Circuit Court, prefacing it with a brief introduction (R. 331, 334). The entire opinion of the Supreme Court of Appeals, including that of the Circuit Court, is reproduced in appendix B to this petition. It has been reported at 127 S.E.2d 406 (Va. 1962).

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on October 8, 1962 (R. 330). This petition is filed within ninety days thereafter, as required by rule 22(1) and computed under rule 34(1) of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. §1257 (3) (1958), since rights are claimed under the Constitution of the United States.

Questions Presented

The questions presented upon which petitioner relies as reasons for granting the writ are as follows:

1. Whether the fourth amendment prohibits the forcible entry by federal officers of a locked container belonging to an accused and the seizure therefrom of evidence against the accused, where the officers act without a search warrant and without the consent of the accused, but rely solely on the consent of a person having custody of the container, knowing that said person does not own the container and has not been given the means of access thereto.

2. Whether an accused, being tried for his life in a small community, is afforded a fair trial and due process of law where, for months before trial, the news media of the area have been saturated with prejudicial evidence not admitted at trial, including information about a first-person account of the crime reported to be in the handwriting of the accused, accusations of commission of other crimes of a similar nature by the accused, conviction of the accused on another charge arising from the same episode, and even accounts of a television program shortly after the other trial in which nine jurors reenacted their deliberations.

If the writ is granted, petitioner proposes also to present the following question, which was raised at all stages of the state court proceedings (R. 17, 26, 90, 196, 281, 422):

> 3. Whether an indigent accused is denied due process of law and equal protection of the laws by being imprisoned before trial 55 miles from the office of his court-appointed counsel instead of in the jail which is used for imprisonment of all other persons awaiting trial in the same court and which is in the same city as the office of his counsel.

Constitutional Provisions Involved

The Constitutional provisions which this case involves are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. amend. IV.

> "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. amend. XIV, § 1.

Statement of the Case

Petitioner, already serving a sentence of life imprisonment, *United States* v. *Rees*, 193 F. Supp. 864, 866 (D. Md. 1961), was indicted for murder in the Circuit Court of Spotsylvania County, Virginia (R. 24), and was convicted (R. 127) and sentenced to death by electrocution (R. 200).

4 Va. Code § 19.1-302 (1960). Execution of sentence has been postponed until final disposition of the case in this Court (R. 367).

The charge against petitioner arose from the disappearance of Carroll Vernon Jackson, Jr., his wife and two young daughters, on the night of January 11, 1959, in Louisa County, Virginia (T. 382-85). The following day, the Jackson car was found deserted by the side of a country road, having apparently been forced off the road by another car (T. 386-88). Several months later, the dead bodies of Jackson and his younger daughter were found in a deserted place in Spotsylvania County, Virginia (T. 418-20), which is adjacent to Louisa County. Near the bodies were found two plastic pistol grips (T. 628). Subsequently, the dead bodies of Mrs. Jackson and the older daughter were found in Anne Arundel County, Maryland (T. 507-08).

On June 24, 1960, petitioner was arrested in West Memphis, Arkansas (T. 781). Shortly thereafter on the same day, two F.B.I. agents went to the house of petitioner's parents in Hyattsville, Maryland (T. 58, 74), informed them that their son had been arrested and was suspected of murder (T. 59-60), and after extended conversation obtained written permission to search their home (T. 70-72). A thorough search of the house and grounds was then conducted by eleven F.B.I. agents (T. 63-64), in the course of which they came upon an accordion case which had been locked with a hasp and padlock (T. 99-100). The case bore the name, address and telephone number of "Dennis J. Werber" (T. 67). It was found adjacent to the attic bedroom in a "crawl space" which was used for family storage (T. 131). Petitioner's father made it clear to the agents that he neither owned the case nor had any knowledge of it or its contents (T. 118). Nevertheless,

according to the testimony of the agent in charge, he authorized the agents to break the lock and search the case (T. 67-68, 117-18; but see T. 130). The agent testified, "We were interested in this bag because when it turned up in the house we were searching we wanted to know whether there was evidence in there" (T. 77).

The case was forcibly opened (T. 68, 118) and inside the agents found a pistol and a first-person handwritten account of the Jackson murders (T. 68-69, 155). These articles were seized by the agents with the permission of petitioner's father, who, however, denied any knowledge of them (T. 68-69). It was later ascertained that the accordion case and its contents belonged to petitioner (T. 77, 150), who had bought the case from Dennis J. Werber (T. 827-29), put the lock on it, and placed it in the attic storage area, where he was accustomed to keep personal belongings (T. 145, 150-51). Petitioner had the key to the lock with him in Arkansas at the time of his arrest (T. 151).

Petitioner was tried in February, 1961, in the United States District Court for the District of Maryland for kidnapping Mrs. Jackson and the older Jackson daughter. See *United States* v. *Rees*, 193 F. Supp. 849 (D. Md. 1961). The trial resulted in a conviction and sentence of life imprisonment. That judgment was not appealed.

Extensive coverage of the proceedings was provided in the newspapers and on radio and television. Several weeks after the verdict in the federal trial, a Baltimore television station broadcast a program in which nine of the jurors who had decided the case reenacted their deliberations for the viewing audience. See *United States* v. *Rees*, 193 F. Supp. 861 (D. Md. 1961). Pictures of the telecast and details of the dialogue were carried in newspapers circulating in Spotsylvania County, Virginia. See appendix A at p. 20.

In June, 1961, petitioner was indicted in Spotsylvania County for the murder of Carroll Jackson (R. 24). The county, having a population of 13,800 persons, is served by one daily newspaper from an adjacent small city. This paper reaches 77% of the homes. The county is also served by at least two daily newspapers from large cities approximately fifty miles away. STANDARD RATE AND DATA SERVICE, INC., SRDS NEWSPAPER CIRCULATION ANALYSIS 344 (1961 ed.) (See also R. 41, T. 29, 33). All three newspapers, as well as local radio and television stations, gave extraordinary coverage to the case (T. 179-80, 204, 207-08). Before the beginning of trial, the local daily had already run the equivalent of 117½ full columns of print on the case and had printed eighty pictures (R. 41). Public interest in the court proceedings ran high (R. 38-39). See pictures, Fredericksburg Free Lance-Star, Sept. 19, 1961, p. 3, cols. 1-3 ("To SERVE HUNGRY VISITORS to the trial of Melvin Davis Rees, Jr., Eastland and Zion Methodist churches set up this food booth on Spotsylvania's courthouse green."), and Sept. 25, 1961, p. 1, cols. 1-4 ("Overflow Crowd Watches Rees, U. S. Marshals Walk to Courtroom").

By the start of trial, newspapers circulating in Spotsylvania County had already made at least a hundred references to the fact that petitioner had been convicted in federal court of kidnapping Mrs. Jackson and the older daughter. See appendix A at p. 19. More than fifty references had been made to the first-person handwritten account of the Jackson deaths which had been seized from petitioner's locked accordion case. *Id.* at p. 17. One paper referred to the account as a "Death Diary" in a front page headline three days before trial. Washington Post, Sept. 15, 1961, p. A1, cols. 1-3. Frequent newspaper reference was also made to accusations by several persons that petitioner had stopped them while driving at night in lonely rural areas by forcing them off the road with his car. One

woman was reported as accusing petitioner of having then made a perverted sexual assault on her. See appendix A at p. 18. Neither the fact of conviction in federal court, the handwritten account of the Jackson deaths, nor the accusations of similar criminal activity in the past, were subsequently admitted in evidence at petitioner's trial (R. 88, T. 626, 861).

Prior to trial, petitioner filed a motion to exclude from evidence the contents of the accordion case searched on June 24, 1960, on grounds that they were unlawfully obtained (R. 51). A brief in support of the motion argued that the search and seizure violated petitioner's rights under the fourth amendment to the United States Constitution (R. 156). The court denied the motion insofar as it pertained to the pistol (R. 88). Objection to admission in evidence of the pistol was renewed at trial (T. 794) and by post-trial motion (R. 196). The opinion of the trial court, in denying the motion, recognized its federal constitutional basis (R. 303). See appendix B at p. 36.

Petitioner also filed a pre-trial motion for change of venue or venire, as permitted by 4 VA. CODE §§ 19.1-212, 19.1-224 (1960), alleging prejudice from press and radio publicity (R. 38). The motion was denied (T. 54-55), renewed at trial and denied again (R. 93). Petitioner moved in arrest of judgment (R. 196), relying on *Irvin* v. *Dowd*, 366 U.S. 717 (1961), in which this Court had just recently reversed a state criminal conviction on grounds that the accused had been denied due process of law by prejudicial publicity, in contravention of the fourteenth amendment (R. 298). The court denied the motion (R. 200).

In selecting a jury, the trial court refused to exclude from service persons who had knowledge of the case from newspapers, radio and television, even though they admitted having formed an opinion as to guilt, so long as they testified that their opinion was not "fixed" and they could decide

the case on the evidence adduced in court (*e.g.*, see T. 179-82, 201-04). Twenty-nine prospective jurors conceded that their opinions were "fixed" and were disqualified (T. 178, 184, 205, 208-09, 229, 237, 246, 251, 294, 311-12, 331-32, 337-38, 354). Although petitioner exercised all his peremptory challenges (T. 332), 4 VA. CODE § 19.1-208 (1960), there remained on the jury which decided his fate at least two persons who admitted before trial having formed opinions as to guilt on the basis of press, radio and television reports (R. 97, T. 180-81, 201-04).

At the conclusion of the trial, petitioner's motion for a directed verdict was denied (T. 1004-06). The jury returned a verdict of guilty with the death penalty after deliberating less than an hour (T. 1045, 1047, 1049-50). As stated by the trial judge, the pistol seized from petitioner's locked accordion case, considered with one of the pistol grips found near the body of Carroll Jackson (T. 935-39), formed the "principal evidence" linking petitioner to the crime (R. 315). See appendix B at p. 46.

The trial court pronounced judgment of execution (R. 200), from which petitioner sought a writ of error in the Supreme Court of Appeals of Virginia, alleging violation of his rights under the fourth amendment in admitting in evidence the illegally seized pistol (R. 385), and violation of his rights under the due process clause of the fourteenth amendment in denying a change of venue or venire (R. 411). The Supreme Court of Appeals denied the writ of error, which had the effect of affirming the judgment of the trial court (R. 330).

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Decided Whether the Contents of a Container Made Secure Against Entry and Placed in The Custody of Another Are Constitutionally Protected Against Search Without Warrant or Consent of the Owner, and the Decisions of the Federal Circuits and States Are in Conflict on the Point.

At stake in this case is not only the life of this petitioner but a principle of wide application—the right of a person to secure his belongings against governmental search elsewhere than on his own person or premises. The facts show that F.B.I. agents searched a closed container belonging to petitioner which he had attempted to make secure, and that in so doing they had neither petitioner's permission nor a warrant issued upon probable cause.

Justification for the search and seizure was rested solely on the alleged consent of a person owning the premises on which the locked container was found. It is undisputed that this person claimed no ownership of the container or its contents, that the governmental agents knew he made no such claim, and that the agents were in fact interested in the container and its contents only on the theory that they belonged to petitioner (T. 95).

Similar questions of search and seizure may arise frequently—for example, whenever a suitcase is deposited with a hotel or airline or carried in someone else's car; whenever a briefcase is left at a checkroom or a package sent by express; whenever personal belongings are kept in desks or lockers at work or, like here, are placed in trunks or other containers and stored in the cellars or attics of relatives.

The question has already arisen in a number of cases in the federal circuits and state courts, but the decisions

have been in conflict. In *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955), the court held inadmissible evidence seized by breaking into a locked cabinet belonging to the defendant but kept in a garage under the exclusive control of defendant's son-in-law and daughter, who consented to the search and seizure. To the contrary is *Sartain* v. *United States*, 303 F.2d 859 (9th Cir. 1962), where the court held admissible evidence seized by cutting into a locked briefcase belonging to the defendant which had been delivered to the home of an acquaintance but was transmitted by the acquaintance to the police.

In *United States* v. *Blok*, 88 App. D.C. 326, 188 F.2d 1019 (1951), the court held inadmissible evidence seized by police from the defendant's desk in the government office in which she was employed, although permission to enter the desk was given by defendant's official superior. A conflicting decision is *State* v. *Zuehlke*, 239 Wis. 111, 300 N.W. 746 (1941), where the court, although following the exclusionary rule, admitted evidence seized by police from the defendant's desk in the government office where he was employed, on the ground that permission to enter the desk was given by his official superior.

In *United States* v. *Eldridge*, 302 F.2d 463 (4th Cir. 1962) (2-1 decision), the Fourth Circuit held admissible evidence seized from the locked trunk of the defendant's automobile in a search made with the consent of a friend to whom the automobile had been loaned. The majority seemed to indicate that the result would have been different if the defendant had not let his friend have the key to the trunk with the car. *Id.* at 466. However, in the instant case and in petitioner's trial for kidnapping in a federal trial court in the Fourth Circuit, *United States* v. *Rees*, 193 F. Supp. 849, 854 (D. Md. 1961), the pistol seized from the locked accordion case was held admissible notwithstanding petitioner's

father had not been given the key. More recently, a state court has excluded evidence seized without warrant from a closed container belonging to a defendant notwithstanding the absence of a lock and key. See *State* v. *Evans*, 372 P.2d 365 (Hawaii 1962), which held that although the defendant's wife might have authority to permit the police to search their common home in her husband's absence, evidence seized with her consent from defendant's own cuff link case in his bureau drawer was inadmissible.

Since the decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), it is important that this Court provide guidelines for state as well as federal courts in areas of conflict in the application of the fourth amendment exclusionary rule.

Certainly, the historical concern of Anglo-American jurisprudence has been with warrantless searches of secured personalty as well as of realty. Complaints of the colonists in this country were directed not only at searches of their dwellings but at searches of their "boxes, chests, and trunks" in customs or wherever else they might be found. See RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 25 (1955); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937). Moreover, the language of the fourth amendment itself was made to prohibit unreasonable searches not only of one's "person" and "house" but also of one's "effects."

This Court has said that the fourth amendment prohibits governmental search without warrant of packages placed in first class mail. *Ex parte Jackson*, 96 U.S. 727, 733 (1877). It has also held that the fourth amendment prohibits violation without warrant of a leasehold on the property of another, notwithstanding consent of the landowner. *Chapman* v. *United States*, 365 U.S. 610 (1961).

Even if it be assumed that petitioner's father was competent to consent to the search of a locked case which he

knew was not his and to the seizure of contents which he had never before seen, it is questionable whether valid consent was given in this case. Permission to break the lock and search the accordion case was given in the wake of first news of his only son's (T. 133) arrest and possible implication in murder, at a time when he and his wife were being separately and intensively interrogated and no less than eleven F.B.I. agents were combing every nook and cranny of their home (T. 59-76). In a much less emotional and authoritarian atmosphere this Court has found consent to search to be vitiated by "implied coercion." *Amos* v. *United States*, 255 U.S. 313 (1921).

Moreover, any consent to search by petitioner's father was probably vitiated also by misrepresentation on the part of the F.B.I. agents that they could obtain a valid search warrant in the absence of consent (T. 128, 140). The record indicates that at most the only reason the agents had to believe that they would find specific articles related to crime at the residence of petitioner's parents is that they suspected petitioner of crime and they knew he had frequented his parents' residence some months before (T. 94-95, 152). This falls far short of the standards of probable cause established by the Judicial Conference for the guidance of U.S. Commissioners. See UNITED STATES COMM'RS MANUAL 24 (1948). Indeed, if this be probable cause, then virtually every arrest anywhere would automatically entitle the police to search the home of the accused and every other place he had frequented in the past.

Petitioner contends that, if the evidence seized by breaking into his locked accordion case was properly admitted against him, the guarantee in the fourth amendment of his right to be secure in his "effects" becomes largely meaningless. Virginia disagrees, and in consequence it has determined to take petitioner's life. Other courts in other

jurisdictions would obviously have held differently. If the Constitutional guarantee is to be uniformly applied, the issue on which petitioner's life now depends must be resolved by this Court.

II. Petitioner Was Condemned to Death by a Jury Which Was Necessarily Influenced by Inadmissible and Prejudicial Evidence Permeating Extensive Pre-Trial Publicity.

Petitioner was entitled under the due process clause of the Constitution to a fair trial before an impartial and unbiased jury. *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The present case points up the impossibility of obtaining this Constitutional guarantee in a community which has been saturated by news media before trial with information about inadmissible and highly prejudicial evidence.

Prejudice to an accused from wide publicity given to inadmissible evidence is one of the major problems of our time in the administration of criminal justice. While it is hoped that intentionally inflammatory broadcasting and journalism are on the wane, the threat to fair trial from factual reporting unbridled by limitations of admissibility applicable at trial remains as great as ever. In fact, with the recognition by this Court that the federal constitution prohibits the use at trial of certain types of evidence against an accused heretofore admitted in many states, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the possibilities of prejudice have actually increased.

This Court has not focused sharply on a case where injustice to an accused was attributable primarily to exhaustive factual reporting of inadmissible evidence. Yet, as this case illustrates, such publicity may well result both in extreme prejudice and in the extreme penalty.

The recitals in the statement of the case and the citations in appendix A show that, for months before petitioner's trial, Spotsylvania County was saturated with information about inadmissible evidence. Given the nature of the small community, the intensity of public interest in the case and the quantity of publicity it received, it is inconceivable that any intelligent adult in the county did not know of this evidence by the time of trial. It was simply too much to ask, as did the trial judge, that jurors from this county ignore what they had been told many times over—that petitioner had in the past committed crimes showing a similar pattern to that charged, that he had already been convicted by one jury in the Jackson case, and that he had actually set down the details of the Jackson killings in his own handwriting. In *Marshall v. United States*, 360 U.S. 310 (1959), this Court recognized the fallacy of relying on the assurances of jurors that they will not be influenced by news accounts of inadmissible and highly prejudicial evidence. In the instant case, not only did the jurors know of the devastating evidence but they knew that everyone in the county knew of it and would appraise their verdict in light of it.

Moreover, for courts to ignore publicity of the extent to which it existed in this case is to thwart the purpose of exclusionary rules designed to deter police misconduct. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Merely making illegally seized evidence inadmissible in court does not remove police incentive to disregard Constitutional guarantees if the police know that the same evidence may be printed and broadcast every day in the county in which trial is to be had. Indeed, such evidence may be even more effective against an accused than if introduced in court, for he then has no opportunity to attack it by cross-examination or rebuttal.

This Court has already, at the present term, agreed to review a capital conviction involving allegedly prejudicial publicity. *Rideau* v. *Louisiana*, App. Docket No. 630. Although the publicity in that case was dramatic—a televised confession by the accused—it was not so prejudicial as the publicity in the instant case. This is so because the fact of confession in *Rideau* was admitted in evidence at trial. In petitioner's case the facts publicized, including what was represented in the press as in substance a confession, were not admitted in evidence at trial. Yet, these facts had been repeatedly imbedded in the minds of the jurors by pre-trial publicity.

The trial court denied petitioner's motions for a change of venue or venire, primarily on the ground that there was no evidence of "mass prejudice," "mob action," or "inflammatory" or "provocative" comment in the press, radio or television (R. 296). See appendix B at p.30. In so doing, the court ignored the real and insurmountable prejudice to petitioner from constant reference in the news media to damning evidence which was held inadmissible at trial.

Petitioner believes that in a state the size of Virginia, portions of which are over three hundred miles from Spotsylvania County, he could obtain a fair trial by a change of venue or venire. However, if this should not be so, he is unwilling to concede that the state can constitutionally take his life by an unfair trial simply because under existing laws it may be unable to afford him a fair trial. Whether the ultimate solution to the problem of prejudicial pre-trial publicity lies in broadening the contempt powers of courts as in England, SULLIVAN, TRIAL BY NEWSPAPER 212-13 (1961), or in special legislation restricting pre-trial news in criminal cases as has been proposed for this country, Comment, *Case Against Trial by Newspaper: Analysis*

and Proposal, 57 Nw. U. L. Rev. 217, 250 (1962), it is unnecessary here to decide. Petitioner asks only that this Court make clear that no man may be deprived of his life by a trial prefaced by prejudicial publicity of the kind and quantity present in this case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pre-Trial Newspaper Articles Referring to Handwritten Account of Jackson Murders Found in Petitioner's Accordion Case.

Fredericksburg Free Lance-Star:[1] 1960—June 27, p. 1, cols. 4-8 ("description of the final journey of Mrs. Jackson and Susan . . . dated two months before the discovery of their bodies"); June 28, p. 1, cols. 4-5 ("contents have been called obscene and depraved"); June 29, p. 1, cols. 6-8 ("Handwritten Note Describes Attack on Jackson Family," "Writing Seen Similar to That of Davis-Rees"—headlines on front page lead story containing quotations from written account); June 30, p. 1, cols. 1-2; July 1, p. 1, col. 5; July 5, p. 1, cols. 3-5; July 6, p. 1, col. 1; July 11, p. 3, col. 1. 1961—Jan. 30, p. 1, cols. 1-3; Feb. 6, p. 1, cols. 6-8 (quotations from account); Feb. 8, p. 1, cols. 1-3; Feb. 9, p. 1, cols. 3-4, cols. 5-8; Feb. 10, p. 1, cols. 7-8; Feb. 11, p. 2, cols. 6-8; Feb. 13, p. 3, cols. 6-8; Feb. 15, p. 3, cols. 1-3 ("account contained a description of a perverted sex act Mrs. Jackson was allegedly forced to perform"); Feb. 20, p. 1, cols. 1-3; Feb. 21, p. 3, cols. 5-8; Feb. 22, p. 1, cols. 5-8; Mar. 23, p. 1, cols. 5-8; June 20, p. 1, cols. 1-3 ("partly in the first person, extremely brutal"); Aug. 28, p. 1, col. 8 ("purported to describe the last hours of the Jackson family"); Sept. 1, p. 1, cols. 1-3; Sept. 2, p. 1, cols. 6-8; Sept. 8, p. 1, cols. 4-5; Sept. 9, p. 1, cols. 1-3; Sept. 13, p. 1, cols. 6-7; Sept. 14, p. 1, cols. 1-5; Sept. 15, p. 1, cols. 1-3.

Washington Post:[2] 1960—June 27, p. A1, cols. 1-8 ("Rees Wrote Jackson Killing Account Found in Home, Authorities Disclose," "Dated Prior to Finding of 2 Bodies"); June 28, p. A1, cols. 2-4; June 29, p. A1, cols. 1-8 ("Rees

[1] Published at Fredericksburg, Va. Reached 76.9% of households in Spotsylvania County daily; not published on Sunday. STANDARD RATE AND DATA SERVICE, INC., SRDS NEWSPAPER CIRCULATION ANALYSIS 344 (1961 ed.) (See also R: 41, T. 9, 29, 33).

[2] Published at Washington, D. C. Reached 21.3% of households in Spotsylvania County, Va., daily and 43.1% on Sunday. SRDS NEWSPAPER CIRCULATION ANALYSIS, *supra* note 1, at 344 (See also T. 29, 33).

Indicted, Note Is Divulged"—article contains detailed quotations from account), p. A3, cols. 1-3; June 30, p. A3, cols. 1-3; July 4, p. A1, cols. 2-4. 1961—Jan. 24, p. A18, cols. 1-5; Jan. 31, p. A1, cols. 2-3; Feb. 9, p. A3, cols. 1-3; Feb. 10, p. A1, cols. 2-4; Feb. 19, p. A3, cols. 1-2; Aug. 29, p. A3, cols. 1-3; Sept. 2, p. D1, col. 1; Sept. 15, p. A1, cols. 1-3 ("Virginia Court Bars Death Diary from Rees Trial in Jackson Slaying").

Richmond Times-Dispatch:[3] 1960—June 27, p. 1, cols. 4-8 ("Rees Note on Slayings Discovered, FBI Says"); June 28, p. 1, cols. 5-6; June 30, p. 1, col. 1 (details and quotations from account); July 6, p. 4, cols. 7-8. 1961—Jan. 31, p. 1, col. 1; Feb. 3, p. 1, cols. 1-3 ("an obscene account of the slayings in Rees' handwriting"); Feb. 5, p. B2, cols. 1-3; Feb. 9, p. 1, col. 1; Feb. 10, p. 1, cols. 2-3 ("it told of the last horror-filled hours of Mrs. Mildred Hill Jackson, 27, and her daughter, Susan Ann, 5"); Feb. 12, p. B4, cols. 1-8; Sept. 15, p. 2, cols. 1-3.

Pre-Trial Newspaper Articles Referring to Accusations of Similar Criminal Activity by Petitioner in the Past

Fredericksburg Free Lance-Star: 1960—June 25, p. 1, cols. 2-4; June 27, p. 1, cols. 1-3. 1961—Jan. 31, p. 3, cols. 1-3; Feb. 3, p. 1, cols. 6-8; Feb. 7, p. 1, cols. 6-8 ("Rees Resembles Hanover Attacker Near Kidnap Site"); Feb. 8;[4] Feb. 14, p. 1, cols. 1-2 ("Md. Woman Names Rees in '58 Attack"); Feb. 15, p. 3, cols. 1-3; Feb. 21; Feb. 22; Feb. 23, p. 1, cols. 1-8; Feb. 24, p. 1, cols. 4-8, cols. 7-8; Feb. 28, p. 1, cols. 7-8; Mar. 16, p. 1, col. 3; Mar. 23; Mar. 24, p. 4, cols. 5-6; Sept. 9; Sept. 15.

Washington Post: 1960—June 25, p. A1, cols. 1-8; June 29, p. A3, cols. 1-3; June 30. 1961—Feb. 8, p. A3, cols. 1-4; Feb. 15, p. A1, col. 1 ("Mother of Two Describes Terror

[3] Published at Richmond, Va. Reached 17.9% of households in Spotsylvania County daily and 26.3% on Sunday. SRDS Newspaper Circulation Analysis, *supra* note 1, at 344.

[4] Page and column references omitted for articles previously cited in appendix A.

Ride"); Feb. 19; Feb. 23, p. A1, col. 8; Mar. 1, p. A3, cols. 1-2; Mar. 16, p. A3, cols. 7-8.

Richmond Times-Dispatch: 1961—Feb. 8, p. 1, cols. 6-7; Feb. 12; Feb. 15, p. 1, cols. 3-4 ("Woman Relates Ordeal, Names Rees"—headline on article describing "terror-filled two hours at the mercy of a sex fiend"); Feb. 19, p. B4, cols. 3-6; Feb. 22, p. 1, col. 1; Mar. 1, p. 2, cols. 6-8; Mar. 16, p. 1, col. 7; Mar. 23, p. 1, col. 6; Mar. 24, p. 1, cols. 1-2.

Pre-Trial Newspaper Articles Referring to Petitioner's Conviction in Federal Court of Crime Arising from Same Episode.

Fredericksburg Free Lance-Star: 1961—Feb. 23, p. 1, cols. 1-8 ("Rees Found Guilty, Life Is Spared"), p. 3, cols. 3-4; Feb. 24; Feb. 25, p. 1, cols. 6-7; Feb. 28; Mar. 1, p. 1, cols. 5-8; Mar. 2, p. 1. cols. 5-6; Mar. 3, p. 1, col. 8; Mar. 4, p. 1, cols. 4-7; Mar. 9, p. 1, col. 7; Mar. 10, p. 1, cols. 2-5; Mar. 16; Mar. 23; Mar. 24; Mar. 25, p. 1, col. 4; Mar. 28, p. 3, cols. 7-8; Mar. 30, p. 1, cols. 1-2; Mar. 31, p. 1, col. 5; Apr. 7, p. 1, cols. 1-2; Apr. 13, p. 1, col. 1; Apr. 14, p. 1, cols. 4-5; Apr. 17, p. 3, col. 2; Apr. 18, p. 1, col. 1; Apr. 19, p. 1, cols. 2-3; Apr. 25, p. 1, col. 1; May 1, p. 1, cols. 5-6; May 3, p. 3, cols. 1-2; May 18, p. 1, cols. 5-8; May 19, p. 1, cols. 5-6; May 22, p. 1, cols. 7-8; May 24, p. 1, col. 4; May 25, p. 1, cols. 3-4; May 26, p. 1, col. 4; May 27, p. 1, cols. 6-7; June 1, p. 3, cols. 6-7; June 2, p. 1, cols. 1-4; June 3, p. 1, col. 8, p. 3, cols. 3-5; June 5, p. 1, cols. 6-8; June 6, p. 1, cols. 2-3; June 20; July 17, p. 1, cols. 1-3; Aug. 1, p. 3, cols. 1-2; Aug. 28; Sept. 1; Sept. 2; Sept. 8; Sept. 9; Sept. 11, p. 1, cols. 1-2; Sept. 13; Sept. 14; Sept. 15.

Washington Post: 1961—Feb. 24, p. A1, cols. 1-8 (Banner lead over masthead—"Rees Convicted, Escapes Death Penalty"); Feb. 25, p. A1, cols. 6-8; Mar. 1; Mar. 2, p. A3, cols. 1-2; Mar. 3, p. A3, col. 1; Mar. 10, p. A3, col. 5; Mar. 16; Mar. 24, p. A1, col. 1; Mar. 25, p. A1, cols. 1-3, p. A10, cols. 1-2; Mar. 31, p. A3, cols. 1-3; Apr. 7, p. A1, cols. 1-8 (Banner lead over masthead—"Rees Gets Life Term in Jackson Slayings"); Apr. 18, p. A3, col. 6; Apr. 19, p. A3, cols. 3-5;

May 3, p. A3, cols. 4-5; May 19, p. A3, col. 1; May 20, p. C2, cols. 2-4; June 6, p. A3, cols. 7-8; July 18, p. A3, col. 5; Aug. 29; Sept. 14, p. A3, col. 4.

Richmond Times-Dispatch: 1961—Feb. 24, p. 1, cols. 5-8 ("Rees Is Found Guilty; Execution Not Asked"); Feb. 25, p. 10, cols. 1-2 ("Try Him in Virginia!"—lead editorial. "Melvin D. Rees, Jr., has just been convicted of one of the most horrible crimes in this country's annals. . . ."); Feb. 26, p. B2, cols. 1-3; Mar. 1; Mar. 2, p. 1, cols. 7-8; Mar. 3, p. 2, cols. 6-7; Mar. 10, p. 1, cols. 1-3; Mar 11, p. 2, cols. 7-8; Mar. 16; Mar. 23; Mar. 24; Mar. 25, p. 2, cols. 1-2; Mar. 28, p. 2, cols. 1-2; Mar. 31, p. 2, cols. 5-6; Apr. 7, p. 1, col. 4; Apr. 14, p. 2, cols. 7-8; Apr. 18, p. 2, cols. 7-8; Apr. 19, p. 2, cols. 1-2; May 3, p. 2, cols. 3-4; May 20, p. 2, cols. 7-8; May 23, p. 8, cols. 5-8; May 24, p. 8, cols. 1-2; May 27, p. 1, cols. 1 2; May 29, p. 5, cols. 6-7; June 3, p. 1, cols. 1-2; June 6, p. 8, cols. 1-3; July 7, p. 5, col. 3; July 14, p. 6, col. 5; July 18, p. 1, cols. 1-2; Sept. 12, p. 2, cols. 2-3; Sept. 15; Sept. 17, p. B2, col. 7.

Pre-Trial Newspaper Articles About Television Program on Which Jurors Reenacted Deliberations Leading to Petitioner's Conviction.

Fredericksburg Free Lance-Star: 1961—Mar. 23; Mar. 24, p. 1, cols. 5-6 (detailed account of what jurors said in reenacted deliberations), p. 3, cols. 1-3 (picture from telecast); Mar. 25; Mar. 28; Mar. 30; Mar. 31; Apr. 7; Apr. 13; Apr. 25; May 3.

Washington Post: 1961—Mar. 24, p. A1, col. 1 (detailed account of what jurors said in reenacted deliberations), p. A3, cols. 2-4 (picture from telecast); Mar. 25; Mar. 31; Apr. 7.

Richmond Times-Dispatch: 1961—Mar. 24 (detailed account of what jurors said in reenacted deliberations); Mar. 25; Mar. 28; Mar. 31; Apr. 7; May 3.

APPENDIX B

OPINION OF SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices

MELVIN DAVIS REES, JR.

v.

COMMONWEALTH OF VIRGINIA

Record No. 5438-R

PER CURIAM

Richmond, Virginia, October 8, 1962

From the Circuit Court of Spotsylvania County,
John D. Butzner, Jr., Judge

ON A PETITION FOR A WRIT OF ERROR AND SUPERSEDEAS

Melvin Davis Rees, Jr., was found guilty by a jury of murder in the first degree for the slaying of Carroll Vernon Jackson, Jr., and his punishment fixed at death. His motion to set aside the verdict was overruled and judgment was entered on the verdict. To that judgment he seeks a writ of error upon the following assignments:

(1) The refusal of the court to order the transfer of the defendant from the State Penitentiary to the city jail in Fredericksburg, Virginia, so that he might be near his court-appointed attorneys.

(2) The refusal of the court to order a change of venue or change of venire, especially in view of the difficulty in obtaining a panel and of the fact that the jury deliberated less than an hour in arriving at a death sentence.

(3) The court erroneously admitted in evidence the .38

caliber pistol which was taken by unlawful search and seizure.

(4) The refusal of the court to sustain the motion to strike the Commonwealth's evidence at the conclusion of the Commonwealth's case and at the conclusion of the whole case;

The refusal of the court to rule that the evidence is insufficient to support the verdict; and

The refusal of the court to set aside the verdict as contrary to the law and evidence and award the defendant a new trial.

(5) The court erroneously admitted in evidence the testimony of many witnesses relative to the finding of the two bodies in Maryland.

(6) The court erroneously admitted in evidence the testimony of Thornton Shackelford.

In passing on the defendant's motion for a new trial the lower court, in an exhaustive written opinion, considered the sufficiency of the evidence and the other matters presented in the assignments of error. A careful review of the record convinces us that the judgment of the lower court is plainly right and that the writ prayed for should be denied. The written opinion of the lower court, which is a full and complete answer to the arguments advanced on behalf of the defendant on this appeal, is adopted as the opinion of this court.

"In the evening of January 11, 1959, Carroll Vernon Jackson, Jr., his wife, Mildred, and their two daughters, Janet and Susan, left the home of Mrs. Jackson's parents in Louisa County, Virginia, to drive fifteen miles to their own home. The next morning their empty car was found about half-way to their destination partly on the shoulder of the road. Skid marks of another vehicle were immediately in front of the Jackson car at an approximately forty-five degree angle to the highway.

"On March 4, 1959, the bodies of Jackson and his daughter, Janet, were found in Spotsylvania County. Jackson had been fatally shot in the head. Dr. Geoffrey T. Mann,

Medical Examiner of Virginia, testified that in his opinion the wound was caused by a .38 caliber bullet. Jackson's head had been beaten severely. Dr. Mann testified that these wounds could have been caused by any number of objects including a pipe or a pistol butt.

"Near Jackson's body were found a pair of plastic gun grips (Com. Ex. 39 and 40), and Jackson's broken eyeglasses (Com. Ex. 41).

"On March 21, 1959, the bodies of Mrs. Jackson and Susan, were found near Gambrills, Maryland. Both Mrs. Jackson and her daughter had been beaten about their heads, which with aspiration of blood caused their deaths. A silk stocking was found knotted around Mrs. Jackson's neck. Marks on her neck indicated that she probably had been strangled by this stocking, although it is possible that she could have been hanged. The clothes on Mrs. Jackson and her daughter were found intact with the exception of Mrs. Jackson's coat which had been pulled over her head. A button from the coat was found in a shack not far from the bodies.

"In January 1959 the defendant, Melvin Davis Rees, Jr., was living in a beach house in Norfolk, Virginia, which he shared with a friend, Glenn Moser. Living with the defendent was a woman, Pat Rouett, who also was known as Pat Weidenhouse or Pat Rees. Rees left Norfolk in his car between 5:30 p.m. and 6:00 p.m., January 11, 1959 for Washington where he was to play the vibraphone at Harrigan's Restaurant.

"Robert Engle, manager of Harrigan's, and Phillip Troup, who was in charge of the orchestra, testified that Rees had been engaged to play in the orchestra at the restaurant over a period of several months and that occasionally he had failed to appear, but they were not able specifically to state whether he played there on the night of January 11, 1959. Moser testified that Rees said he had someone else fill the engagement.

"Mr. and Mrs. Melvin Davis Rees, Sr., parents of the defendant, testified that at 10:30 on the morning of January 12, 1959 he came to their home in Hyattsville. He appeared normal, and he helped his father gather firewood. He gave

lessons that day from 3:30 p.m. to 9:00 p.m. at Flynn's Music School, Washington. William Flynn, proprietor of the school, testified he was neat in appearance. Mrs. Ivy L. Johnson, testified that she was his first pupil and he was sloppy and unshaven. His clothes appeared to have been slept in. She believed he had mud on his trousers, but of this observation she could not be certain.

"Moser testified that after the bodies of the Jacksons were found, he accused Rees of the crime, and that Rees made no denial and caused his car to collide with another car.

"The Commonwealth introduced evidence that Rees had been seen on December 28, 1958—about two weeks before the Jacksons' disappearance—approximately 29 miles from the place where Jackson's car was found. Phillip Troup testified that on December 27, 1958 Rees played in his orchestra in Alexandria, Virginia. Troup last saw Rees in the company of Pat Weidenhouse about 1:20 a.m. December 28th. Pat Weidenhouse testified on behalf of the defendant, but she made no reference to this incident.

"Rees and Pat Weidenhouse moved to Memphis, Tennessee. There on June 24, 1960 Rees was arrested on a fugitive warrant for a crime not pertinent to this case.

"On June 24, 1960 agents of the F. B. I. searched the home of Mr. and Mrs. Melvin Davis Rees, Sr. In a crawl space in the attic, the agents found an accordion case which contained among other things a .38 caliber Colt Cobra revolver. (Com. Ex. 9)

"The revolver had been sold by Rich's Department Store, Atlanta, Georgia, to William D. Bage. Bage was dissatisfied with the plastic gun grips on the revolver. He purchased a pair of simulated-horn gun grips and fastened them to the revolver. He also purchased a leather holster. In 1957 Bage, advertised the gun for sale in the newspaper and sold it, together with the holster and extra pair of plastic grips, to Rees.

"Allison C. Simms of the F. B. I. laboratories testified that the gun contained minute traces of human blood. He was unable to type this blood or determine how long it had

been on the gun. He also found blood on the left gun grip, but was unable to determine whether or not it was human blood.

"George A. Berley of the F. B. I. laboratories examined both the gun, which had been found in the home of the defendant's parents, and the grips, which were found near the body of Jackson. From his examination he concluded that the right grip had at one time been on the gun. He reached this conclusion because of marks or scratches on the interior surface of the grip, which in his opinion could have been caused only by the surface of the metal on the gun butt. He was unable to find identifying marks on the left grip. He also testified that the right grip had defects, which in his opinion could have been caused by force exerted on the grip. This force could have been caused by using the revolver, with the grips attached, to strike a blow. In his opinion the screw attaching the grips to the butt had broken.

"The jury found the defendant guilty of murder in the first degree and fixed his punishment at death. Counsel for the defendant moved to set aside the verdict as contrary to the law and the evidence assigning the following grounds:

1. The refusal of the Court to order the transfer of the defendant from the State Penitentiary to the City Jail in Fredericksburg, Virginia, so that he might be near his court-appointed attorneys.

2. The refusal of the Court to order a change of venue or change of venire, especially in view of the difficulty in obtaining a panel and of the fact that the jury deliberated less than an hour in arriving at a death sentence.

3. The Court erroneously admitted in evidence the testimony of many witnesses relative to the finding of the two bodies in Maryland.

4. The Court erroneously admitted in evidence the .38 caliber pistol which was taken by unlawful search and seizure.

5. The Court erroneously admitted in evidence the testimony of Thorton Shackelford.

6. The refusal of the Court to sustain the motion to strike the Commonwealth's evidence at the conclusion of

the Commonwealth's case and at the conclusion of the whole case.

7. The action of the Court in giving and refusing certain instructions as set forth in detail in the record of the trial.

8. The evidence is insufficient to support the verdict.

9. Certain other and additional grounds which will be more fully set forth when the transcript of the trial is available. (No additional grounds were filed, however.)

"The Court overruled the motion and entered judgment on the verdict.

Motion To Transfer To The Fredericksburg Jail

"On May 26, 1961 the Court, at the request of the defendant, appointed counsel for him. The Court appointed Mr. Alfred W. Garnett, and Mr. Joseph L. Savage, Jr., of Fredericksburg, Virginia, both of whom are able, competent attorneys practicing at the bar of this Court and held in high esteem. Both have had considerable experience practicing criminal law. They prepared their case with diligence, and throughout the trial conducted a skillful and determined defense.

"Counsel for the defendant moved that he be incarcerated in the City Jail, Fredericksburg, Virginia, instead of in the State Penitentiary, Richmond, Virginia. The motion was renewed on June 5, 1961, and later a supporting affidavit was filed.

"In order to understand this motion, it is necessary to review briefly the background of this case. The defendant previously had been convicted in the United States District Court for Maryland for kidnapping Mrs. Mildred Jackson and her daughter, Susan. He had been sentenced to life imprisonment and this judgment is final. *United States* v. *Rees*, 193 F. Supp. 849 (1961).

"On May 26, 1961 the United States Marshall for the Eastern District of Virginia produced the accused before this Court pursuant to a writ of *habeas corpus ad prosequendum*. The arrangement by which the defendant was brought to Virginia for trial is an example of the comity existing between Virginia and the United States. The

procedure is based upon sound precedent. *Chapman* v. *Scott*, 10 F. 2d 690 (2d Cir. 1926) *cert. denied* 270 U.S. 657 (1926) and *Wilkinson* v. *Youell*, 180 Va. 321, 23 S.E. 2d 356 (1942).

"Mr. Chief Justice Taft said in *Ponzi* v. *Fessenden*, 258 U.S. 254, 266 (1922):

> 'The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, *which only insists on his being kept safely from escape or from danger, under the eye and control of its officer.* This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.' (Italics added)

"The United States Marshall for the Eastern District of Virginia was charged with the protection of the defendant and with preventing self-inflicted harm. He also was charged with the duty of preventing the escape of the defendant, who was a prisoner of the United States. In the discharge of this duty, the Marshall determined that it was, in his judgment, feasible and necessary to use the facilities of the Virginia State Penitentiary for the incarceration of the prisoner.

"The Marshall in the discharge of his duty cooperated fully throughout the trial with the officers of this Court. Insofar as the Court has been advised, the Marshall cooperated in every way with the defendant's attorneys. At no time did counsel call to the attention of the Court any difficulty caused by the Marshall in the preparation or the trial of the case.

"It should be noted that Richmond is only a little more than fifty miles from Fredericksburg and that the cities are connected by a four lane highway.

"No evidence was offered in support of the motion. The Court, however, did hear argument of counsel and the statement of the Marshall in open court that he would cooperate in every way possible to make the prisoner available for conferences with his attorneys.

"The Court recognized that it was essential for adequate representation of the defendant that his counsel have an

opportunity to confer privately with him in preparation of the case and during the course of the trial. To accomplish this the Court took several steps which perhaps went beyond the arrangements ordinarily made in the trial of a criminal case.

"First, on May 26th the Court delivered to the United States Marshall a letter, delivered copies to counsel, and filed a copy with the papers in the case, arranging for conferences in Richmond if such should be necessary.

"Second, the Court advised counsel that during the preliminary procedures and during the trial it would recess Court upon request of counsel in order that they could confer privately with the defendant during the case. Throughout the trial this was done on a number of occasions.

"Third, the Court recognized that counsel should have facilities for conferring privately with the defendant at Spotsylvania Courthouse. In order to make this possible, the Court secured a private office on the courthouse grounds for defense counsel.

"Before the trial, the defendant was brought to Spotsylvania Courthouse six times, May 26, June 2, June 5, July 17, September 1 and September 14. On each of these occasions, counsel for the defendant were afforded an opportunity and place privately to confer with him as long as they desired.

"The Marshall offered to bring the defendant to the courthouse as early in the morning as counsel requested and to keep him there after court in the afternoon as long as counsel wished to confer with him. At no time during the preliminary proceedings, during the trial itself, or in the hearing on the motion to set aside the verdict, did counsel for the defendant call to the attention of the Court any specific impediment to their preparation for trial or to their conduct of the trial other than the matters stated generally in their motion and affidavit.

"The Court noticed throughout the preliminary proceedings and during the trial that counsel availed themselves frequently of the facilities that had been placed at their disposal and of the recesses that were granted to them for the purpose of conferring with the defendant.

"A fourth arrangement to assist counsel for the defendant in the preparation and conduct of the trial was the agreement made between the attorney for the Commonwealth and the attorneys for the defendant. The attorney for the Commonwealth agreed to advise defense counsel of the witnesses he intended to call each day. This agreement was made with the approval of the Court, and the Court further instructed that counsel for the defendant were to have an opportunity to interview privately witnesses for the Commonwealth. The Court deemed this necessary because the Commonwealth summoned witnesses from distant cities. Counsel for the defendant had the benefit of the transcript of the trial in the United States District Court for Maryland in which most of these witnesses had testified. When necessary the Court granted recesses in order that counsel could interview witnesses.

"The defendant never moved for a continuance in order to enable his counsel to have further conferences with him. Indeed, at the opening of the trial his counsel specifically stated that the defense was ready to proceed (T. 159).

"In the opinion of the Court the matters set forth in the motion and affidavit were insufficient to show prejudice to the rights of the defendant. No specific impediment to the effective aid of counsel in the preparation or trial of the case has been shown. No continuance was sought. The defendant does not show that his incarceration in Richmond prevented counsel from preparing his defense or summoning witnesses. When the motion is carefully analyzed it is apparent that it is based on the sole fact that a little over fifty miles separated Fredericksburg and the place where the defendant was jailed. In view of the arrangements made to provide counsel and the defendant with frequent private conferences both before and during the trial, the defendant was in no way prejudiced. Finally, the preparation, ability and diligence which counsel for the defendant demonstrated throughout the case refutes any inference that the defendant was not effectively represented.

"This case, therefore, materially differs from the cases cited by counsel in the excellent brief they have prepared.

Change of Venue and Change of Venire

"The defendant moved for a change of venue or a change of venire (T. 7-55). In support of these motions he filed one affidavit and called five witnesses.

"The affidavit was given by the publisher of the *Free Lance-Star*, a newspaper published in Fredericksburg, Virginia: It states the circulation of the paper and the amount of news coverage pertaining to the case. No claim was made by the defendant and no evidence was introduced that the articles in the newspaper were inflammatory, prejudiced, or biased against the defendant. There was no evidence that the articles were anything other than factual news accounts. This is not sufficient to warrant a change of venue or a change of venire. *Hampton* v. *Commonwealth*, 190 Va. 531, 58 S.E. 2d 288 (1950), *cert. denied* 339 U.S. 989 (1950).

"In the opinion of some of the defendant's witnesses an undisclosed number of people in the county were of the opinion that the defendant was guilty. It further appeared that this opinion was based primarily upon what some of the people had read in the newspapers and heard on the radio. One of the witnesses expressed the opinion that the defendant could not receive a fair and impartial trial in the county.

"There was no evidence introduced of mass prejudice against the defendant, of mob action, or threat of such action. There was no evidence of inflammatory newspaper editorials or interviews, of provocative radio or television commentaries. There was no evidence that it was the predominant belief in the county that the defendant was guilty. There was no evidence that it was the predominant belief among the people of the county that the defendant could not receive a fair and an impartial trial.

"The Commonwealth introduced the evidence of three witnesses. The gist of this testimony is that the defendant could receive a fair and impartial trial in the County. The attorney for the Commonwealth advised the Court he had summoned thirty-two additional witnesses who were present and ready to testify. He stated, however, that their evi-

dence would be cumulative. The Court indicated that it did not wish to hear cumulative evidence because the issue on the motions should be decided on the evidence presented and not on the number of witnesses called to testify for one party or the other.

"The lack of hostility and prejudice is not difficult to understand. Jackson's death occurred almost thirty months before the hearing on the motions. It is well established that the Court must look to conditions at the time of the trial and not the conditions at the time of the homicide. *Evans* v. *Commonwealth*, 161 Va. 992, 170 S.E. 756 (1933).

"Interest, agitation, and apprehension concerning the case had diminished over the intervening years. Moreover, the Jackson family were not residents of Spotsylvania County. They lived in Louisa County and there was no evidence to indicate that they were closely related or well known in Spotsylvania County. Nor was the defendant known in Spotsylvania County.

"Throughout the trial there was no indication of any hostility, prejudice, bias or mob action against the defendant. Often the small courtroom was not filled. During the latter stages of the trial, particularly when it was expected that the defendant's witnesses would testify, more spectators appeared at the courthouse than could be accommodated in the courtroom. The majority of these spectators were women and they appeared to be present out of curiosity. There were no demonstrations of any kind against the defendant—either inside or outside the courtroom.

"In *Farrow* v. *Commonwealth*, 197 Va. 353, 355, 89 S.E. 2d 312, 313 (1955), Mr. Justice Smith said,

> 'The law presumes that a defendant can get a fair and impartial trial in the county in which the offense was committed.' Hence, in order to overcome this presumption the burden is upon the one requesting a change of venue to show clearly that there is such a widespread feeling of prejudice on the part of the citizens of the county as will be reasonably certain to prevent a fair and impartial trial.'

"In *Pannill* v. *Commonwealth*, 185 Va. 244, 38 S.E. 2d 457 (1946) the Supreme Court of Appeals pointed out that the court may overrule a motion for a change of venire and refuse to summon a jury from another county until an ineffectual effort has been made to obtain an impartial jury from the county where the trial is to take place.

"The jury was selected on September 18th and during the morning of September 19th. The Court previously had ordered additional jurors to be drawn and summoned so seventy-five jurors would be in attendance. Several presented evidence of ill health, and they were excused. A number of farmers qualified upon the *voir dire* examination, but upon suggestion of defense counsel claimed their right of exemption. At the end of the first day, the panel was exhausted, but nineteen veniremen had qualified under the examination of the Court and the searching examination of counsel.

"The defendant thereupon renewed his motions which the Court overruled pointing out that a panel of twenty jurors and four alternates would have been selected had it not been for the exclusion of farmers who claimed their exemption. The Court thereupon caused to be summoned twenty-five additional jurors for attendance upon the Court the next day. From these the panel of twenty was completed and four alternates were selected, all of whom were qualified jurors.

"The defendant cites *Irvin* v. *Dowd*, 366 U.S. 717 (1961). The facts in that case are so different from the case at bar that it is not decisive of the issues here. There the build-up of prejudice was clear and convincing. Here there is no evidence of prejudice.

"Some veniremen stated they had formed some impression or opinion from what they had read in newspapers, or heard on television and radio. This alone is not a reason for disqualification, *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961), *Ballard* v. *Commonwealth*, 156 Va. 980, 999, 159 S.E. 222, 229 (1931).

"No juror who was selected had a fixed opinion which repelled the presumption of innocence. The defendant did not object to the inquiries which the Court made on *voir*

dire, nor did the defendant except to rulings of the Court concerning the qualifications of the jurors.

"The defendant points out that the jury were out about thirty minutes, returned to court so a juror could ask a question concerning an inquiry that had been made about him, went out a second time and after twenty-six minutes returned their verdict. The jury were out about fifty-six minutes. The defendant speculates that they did not use all this time deliberating his case and that in any event they reached a speedy verdict which indicates he should have been granted a change of venue or venire.

"No case has been cited supporting the defendant's contention. The only Virginia case that has been called to the attention of the Court regarding the length of time a jury deliberates is *Simmons* v. *Boyd*, 199 Va. 806, 102 S.E. 2d 297 (1958). As counsel very frankly concede, that case does not support the defendant's position.

"The defendant contends that the length of time the jury stayed out, together with other factors including the length and complexity of the trial, entitles him to a new trial. This contention is without merit. No case has been cited holding that deliberation of fifty-six minutes as a matter of law shows that the jury was biased or prejudiced. While it is true the trial took nine days, a good deal of this time was spent in selection of a jury, recesses for the purpose of interviewing witnesses, taking testimony and hearing arguments on the admission of evidence in chambers, hearing motions in the absence of the jury and considering instructions, and other matters not proper to place before the jury.

"It is also true that many witnesses were heard and exhibits admitted. But an examination of the record will show that the testimony of many of the witnesses was not highly controversial. Several witnesses, including both Commonwealth and defense, were not cross-examined. Most of the Commonwealth's evidence was uncontradicted, and this factor tended to simplify some of the issues.

"An examination of many of the exhibits and the testimony that accompanied them shows that they were so simple and so thoroughly explained from the witness stand

that they required little or no additional study by the jury during their deliberations.

"The defendant points out that as the trial neared an end the Court requested the jurors to bring night clothes and toilet articles. In the brief filed in support of the motion for a new trial, the defendant interprets this to mean 'an indication from the trial judge that a longer period of deliberation was expected.' An examination of the transcript, page 1003-A shows that this interpretation is not supported by the record.

"While the Court and counsel hoped to get the case to the jury by about the middle of the next day, the Court at the time it recessed the jury could not be sure at what hour the case would be submitted. The jury throughout the trial had been alert and attentive. But the Court could form no idea, and never attempted to hazard, how long they would require for their deliberations. The Court simply indicated that regardless of when the case was submitted they would be kept in custody while they deliberated as the statute, in the discretion of the Court, provides.

"The Court is of the opinion that nothing concerning the background, circumstances, or trial of this case justified granting the defendant's motion for a change of venue or venire.

Search and Seizure

"The defendant moved to exclude evidence which was obtained by agents of the Federal Bureau of Investigation in a search of his parents' home. On September 1, 1961 the Court heard testimony, and on September 14, 1961 counsel presented excellent written briefs and argued the motion. (T. 57-157)

"The Court excluded papers found in the home (Com. Ex. 9a-14 for identification). Admitted into evidence were the gun which the agents found (Com. Ex. 9), and the case in which the gun and papers were found (Com. Ex. 8).

"On January 24, 1960 F.B.I. agents called at the home of the defendant's parents. The agents advised them that their son was under arrest in Memphis, Tennessee, on a warrant charging unlawful flight to avoid prosecution in Mary-

land. The agents asked for permission to search the house and after some discussion permission was granted in writing by Mr. Rees' (Com. Ex. 1) and orally by Mrs. Rees. Mr. Rees also assisted by supplying the agents with a light bulb for the attic.

"In the attic the agents noticed a hole cut through the rear of a closet leading to a crawl space. There they found a suitcase, or an accordion case, which they brought downstairs and showed to Mr. Rees. It contained the name, address, and phone number of Dennis J. Werber. Mr. Rees disclaimed any knowledge of the case or of Mr. Werber. He consented to the agents opening the case. This they did by means of a pliers and a screwdriver, since it was secured by a hasp and lock.

"In the case the agents found a gun, which was one of the specific items for which they were looking. They also found a number of papers. Mr. Rees permitted the agents to remove the case and its contents and took a receipt.

"The defendant did not regularly occupy the home in which his parents lived. He claimed to use it as a base of operation but he had not lived there with any frequency or regularity in the last two years. He had not paid any room or board since 1958 except for a small sum paid in the spring of 1960. Whether this was for current or past board was not definitely stated. When the defendant did visit his parents he was treated as a guest. He used whatever part of the premises at that time was most convenient for him to use. He had no regular room or quarters. He did not exclusively occupy and use the attic, or even the crawl space where the case was found. Other members of the household and their guests, from time to time, used various rooms in the house and also the attic. The defendant's father, testified he had cut the opening in the closet to the crawl space many years before, and he used the crawl space for storage of his belongings.

"The defendant testified he placed the locked case in the crawl space. He retained the key. He admitted ownership of the case and of its contents.

"The articles found by the agents were identified as follows:

Commonwealth's Exhibit 8, accordion case.

Commonwealth's Exhibit 9, .38 caliber Colt Cobra revolver, with holster.

Commonwealth's Exhibit 9a for identification is a handwritten statement. It describes Jackson's murder and the brutal and perverted attack made on Mrs. Jackson. Pasted to the paper are newspaper pictures of Mrs. Jackson and her daughter with drawings added.

Commonwealth's Exhibits 10, 11, 12 and 13 for identification are newspaper and magazine clippings, and notes.

Commonwealth's Exhibit 14 for identification are magazines from which the above mentioned clippings had been taken prior to the search by the agents.

"The clippings are voluminous. They consist largely of pictures of nude or nearly nude women on which are superimposed sketches. The exhibits also contain other obscene material. Exhibits for identification 9a through 14 were not admitted in evidence before the jury.

"The defendant bases his motion upon *Mapp* v. *Ohio*, 367 U.S. 643 (1961) which holds '* * * all evidence obtained by searches and seizure in violation of the Constitution is, by that same authority, inadmissible in a state court.'

"The issue of the reasonableness of the search is in the first instance for the determination of the trial court. Each case must be decided on its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950).

"The first circumstance to consider is whether the home of Mr. and Mrs. Melvin Davis Rees, Sr., was also the home of the defendant. The Court finds that it was not. His contention that the home was used as his base of operation is without merit. He was a mature man, living with another woman in the apparent relationship of husband and wife. He had established, from time to time, homes in different cities. He was not a regular occupant of his parents' home. No room or quarters were his. Other people used the same room and quarters that he used when he visited his parents. At the time of the search he was living in a distant city. When he did come to his parents' home his status has been clearly described by his father as a 'welcome guest' (T. 132). In short, by every considera-

tion and test common to ordinary usage and meaning, the home which the agents searched was the home of Mr. and Mrs. Melvin Davis Rees, Sr., and not the home of the defendant.

"The Court further finds that the consent to the search was freely and intelligently given by both Mr. and Mrs. Melvin Davis Rees, Sr. There was no actual or implied coercion. The agents practiced neither trickery nor fraud.

"The accordion case which was found in the attic was in the possession of Mr. Melvin Davis Rees, Sr. The Court finds that he did not claim either the case or the gun were his son's (T. 67, 68, 118). His consent to have it opened was freely given (T. 68). He consented to the removal of the case and its contents after he had an opportunity to inspect them (T. 69).

"The Court finds that the search was not exploratory. The search was not broader than the consent which authorized it. The agents were looking for specific objects connected with the Jackson crime including the gun they found in the case (T. 75, 77, 83, 95, 96).

"The defendant cites *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955). The facts in that case differ from those in the case at bar. There evidence was introduced that the defendant was currently renting and occupying the premises and this was coupled with the testimony of an agent that he was put on notice of the defendant's claim to the cabinet which was searched. There, nothing was in the record to indicate that the officers had previous knowledge a crime had been committed. The defendant also relies on *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956). This case is not inconsistent with the holding in the case at bar.

"A number of courts have considered the effect of a parent's consent on the legality of a search and seizure. In *Morris* v. *Commonwealth*, 306 Ky. 349, 208 S.W. 2d 58 (1958) the defendant was charged with murder. A cartridge case was found in the defendant's home. The father consented to a search of the house in which the defendant lived. The evidence was found in the kitchen which was

under control of the father. The Court held that consent given by the head of the house, or the person in charge of the house, renders competent the evidence.

"In *People* v. *Galle*, 153 Cal. App. 2d 88, 314 P. 2d 58 (1957) the defendant's mother, at the request of the police, consented to a search of her home. The officers found narcotics in her son's coat pocket. The Court held that the evidence was admissible.

"In *Tomlison* v. *State*, 129 Fla. 658, 176 So. 543 (1937) an officer told the defendant's father they would like to go in his son's room. The father consented. The officer found a pair of shoes. These were properly admitted in evidence.

"In *State* v. *Hagen*, 47 Idaho 315, 274 P. 628 (1929) a mother consented to the search of a barn on her premises. There the officers found stolen property. The Court held that the evidence was admissible since the search was not unreasonable.

"In *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951) *cert. denied*, 342 U.S. 868 (1951) a motion was made to suppress evidence obtained in a search of defendant's luggage while he was in jail. The luggage was seized and searched in a hotel room of a woman who thought she was the defendant's wife. The agents' entry and search was by her consent. The court held the motion to suppress the evidence thus obtained was rightfully denied for the defendant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession.

"In *Woodward* v. *United States*, 102 App. D.C. 393, 254 F. 2d 312 (1958) *cert. denied*, 357 U.S. 930 (1958) a householder took in without rent two boys, one of whom was her grand-nephew. She discovered among other articles several guns. She called the officers and invited them to search. It was held that this search was not unreasonable.

"The Court is of the opinion the search in the case at bar was not unreasonable.

"A very helpful annotation on this question may be found in 31 A.L.R. 2d 1078.

"The gun, which the Commonwealth contends was the weapon used to commit the crime, was an appropriate object of seizure. Section 19.1-84(5) Code of Virginia 1950.

"The numerous papers found in the case are of evidential nature only. They are not appropriate objects of seizure even though the search is lawful. In a Federal Court they would be inadmissible by reason of the Fourth and Fifth Amendments. See *Boyd* v. *United States*, 116 U.S. 616 (1886), and *Gouled* v. *United States*, 255 U.S. 298 (1921).

"The Commonwealth contends that the paper concerning the Jacksons (Com. Ex. 9a for ident.) is admissible because *Mapp* v. *Ohio*, *supra*, does not make the Fifth Amendment a criterion with regard to the admission of evidence in state courts.

"This argument overlooks the fact that Section 8 of the Virginia Constitution provides in part that a man shall not '* * * be compelled in any criminal proceedings to give evidence against himself * * *.' It is significant that in Virginia no search warrant can be issued for the search and seizure of papers of an evidential nature. See Section 19.1-84 Code of Virginia 1950.

"*Powell* v. *Commonwealth*, 167 Va. 558, 189 S.E. 433 (1937) is instructive. There the attorney for the Commonwealth in the presence of the jury stated that a *subpoena duces tecum* had been served upon the defendant requiring him to produce certain notes alleged to have been forged, and in open court called upon the defendant to produce the notes. The Court held that the demand made in the presence of the jury was error. Mr. Justice Holt said, 'To demand from the accused a document from which his guilt may be inferred is scarcely less harmful than to place him upon the stand and to ask him if he is guilty.' In reaching this conclusion the court relied in part on *McKnight* v. *United States*, 115 F. 972 (6th Cir. 1902) where it is said, 'The court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing.'

"In the *Powell case* the Supreme Court of Appeals further pointed out that the privilege against self-incrim-

ination is highly personal and no one can waive this right for the accused except the accused himself.

"Melvin Davis Rees, Sr., could consent to the search and thus eliminate the need of a search warrant for the gun (Com. Ex. 9). However, he could not waive the protection against self-incrimination granted to his son by the Constitution of Virginia. For this reason the Court is of the opinion that the papers were not admissible in evidence. See also, *Blum* v. *State*, 94 Md. 375, 51 Atl. 26 (1902).

"In the briefs and arguments before the Court no special mention was made of the accordion case. Suffice it to say that it was not of the same class of evidence as the papers. It was simply the container in which the gun was found.

"During the trial the Commonwealth sought to introduce evidence of what the agents recalled from the handwritten document (Com. Ex. 9a for identification). The Commonwealth took the position that even though the paper itself was not admissible the agents could testify about it. The Court excluded this evidence. *Zapp* v. *United States*, 328 U.S. 624 (1945), upon which the Commonwealth relies is not applicable to this case. There the defendant himself waived his rights. Here the defendant waived nothing. His privilege against self-incrimination could not be waived by his father.

Admission and Exclusion of Evidence

"The defendant objected to evidence and exhibits pertaining to the death of Mrs. Mildred Jackson and her daughter. The Court overruled these objections. As a general rule evidence showing the commission of other crimes is not admissible. There are, however, exceptions to this rule as well established as the rule itself. Evidence is admissible which tends to show a possible motive, intent, or a common scheme embracing a commission of two or more crimes so closely related that proof of one tends to establish the other. A number of Virginia cases deal with these principles of law. *Martin* v. *Commonwealth*, 143 Va. 479, 129 S.E. 348 (1925); *Boyd* v. *Commonwealth*, 156 Va. 934, 157 S.E. 546 (1931); Nash, *The Law of Evidence* Section 89 (1954).

"Perhaps one of the most instructive cases is *Webb* v. *Commonwealth*, 154 Va. 866, 152 S.E. 366 (1930). In that case Mr. Justice Campbell pointed out the absurdity of excluding evidence of another crime which tended to show the motive of the accused.

"In the case at bar the evidence showed that the entire Jackson family were last seen together driving toward their home. If the evidence of Mrs. Jackson's death and the death of her daughter, Susan, had been excluded there would have been absolutely no evidence before the jury concerning them. This, of course, could lead to speculation that Mrs. Jackson was guilty of her husband's murder. Moreover, if the evidence showing the cause of the deaths of Mrs. Jackson and Susan had been excluded, speculation could still have arisen that Mrs. Jackson was guilty of her husband's murder and had later committed suicide. The location of their bodies with reference to Spotsylvania County, where Jackson's body was found, and the home of the defendant's parents, where the defendant arrived the morning after the Jackson family disappeared was a pertinent circumstance. The several deaths were so intimately connected that all evidence of the death of the other members of the family should not be excluded. Moreover, the evidence tended to show a motive—abduction of Mrs. Jackson—for the murder of Jackson. Such evidence, while not essential, is important. *Ferrell* v. *Commonwealth*, 177 Va. 861, 873, 14 S.E. 2d 293, 298 (1941)."

"The Court excluded photographs of Mrs. Jackson's body (T. 516). The Court was of the opinion that the evidence of the deaths of Mrs. Jackson and Susan should be limited to facts reasonably related to the circumstances of Jackson's disappearance and death. The Court also cautioned the jury that they were not trying the defendant on charges concerning other members of the family.

"The Court admitted testimony of Thornton Shackelford that he had seen Rees on September 28, 1958 in Gordonsville, Virginia, and had seen the car Rees was driving about twenty-nine miles from the point where the Jackson car was found. Shackelford was positive in his identification. The Commonwealth limited its direct examina-

tion of the witness to the bare facts of identification, time, and location. The defense, however, showed on cross-examination that Rees had followed Shackelford's car. There was no evidence, however, in this connection that Rees had committed any crime.

"The admission of this testimony depended upon its relevancy and materiality. Evidence which tends to prove a fact from which a fact in issue may be inferred should be admitted. The weight of the evidence is for the jury. This is particularly true with regard to cases dependent upon circumstantial evidence. *Huffman* v. *Commonwealth*, 168 Va. 668, 190 S.E. 265 (1937); Nash, *The Law of Evidence* page 125 (1954).

"In the case at bar the Court deemed a relevant circumstance that Rees, who lived and worked miles away, had been seen in Louisa County in the early morning hours some two weeks before the crime at a point not far from where the Jacksons' car was found.

"The Court upon objection of the defendant excluded the following evidence offered by the Commonwealth:

Testimony that a man who appeared to be Rees attempted to stop Mr. and Mrs. Keith Waldrop on the highway about 12 miles from the place where the Jackson car disappeared on the same night of the disappearance. *Day* v. *Commonwealth*, 196 Va. 907, 86 S.E. 2d 23 (1955).

Testimony that in August 1958 Rees stopped Mr. and Mrs. Tuozzo on a Maryland road. He ordered Mr. Tuozzo, at pistol point, into the trunk of the car and made a perverted sexual attack on Mrs. Tuozzo. Later both were released unharmed. *Barber* v. *Commonwealth*, 182 Va. 858, 30 S.E. 2d 565 (1944). *Limbaugh* v. *Commonwealth*, 149 Va. 383, 140 S.E. 133 (1927). *Walker* v. *Commonwealth*, 28 Va. (1 Leigh) 574 (1829).

Testimony that in June 1957, in Maryland, Rees attempted to tie the hands of Mr. Adams and place him in the trunk of the car. Rees was armed with a pistol. A struggle ensued and Adams and the young lady who was with him escaped unharmed. *Barber* v. *Commonwealth*, *supra*, *Limbaugh* v. *Commonwealth*, *supra*, *Walker* v. *Commonwealth*, *supra*.

Testimony that after Rees had been told by agents of F.B.I. that he could remain silent, he made tacit admissions and equivocal statements. *Plumale* v. *Commonwealth*, 195 Va. 582, 79 S.E. 2d 610 (1954). *Dukeman* v. *Commonwealth*, 201 Va. 807, 813 S.E. 2d 867 (1960).

Testimony that Rees admitted to agents of the F.B.I. that he engaged in unnatural sexual relations with women. *Barber* v. *Commonwealth*, *supra*, *Limbaugh* v. *Commonwealth*, *supra*.

"In the admission and exclusion of evidence, the Court followed rules which have long been established in Virginia. The Court sought to observe a narrow but more or less precise line that separates the inadmissible from the admissible. Perhaps nowhere is the delineation better made then in the leading cases of *Walker* v. *Commonwealth*, *supra* and *Webb* v. *Commonwealth*, *supra*.

"Thus, evidence of other crimes which tended to show the defendant's proclivity to crime or his attitude was excluded. *Day* v. *Commonwealth*, *supra*, *Barber* v. *Commonwealth*, *supra*, *Limbaugh* v. *Commonwealth*, *supra*, *Walker* v. *Commonwealth*, *supra*.

"Equally well established is the rule permitting the introduction of evidence that shows motive, *Webb* v. *Commonwealth*, *supra*, and circumstances 'so intimately connected and blended with the main fact adduced in evidence, that they cannot be departed from with propriety; and there is no reason why the criminality of such intimate and connected circumstances, should exclude them, more than any other facts apparently innocent.' *Walker* v. *Commonwealth*, 28 Va. (1 Leigh) 574, 576 (1829) (*dictum*).

"The facts in *Hardy* v. *Commonwealth*, 110 Va. 910, 922, 67 S.E. 522, 527 (1910) are not similar to those in the case at bar. In that case, however, Mr. Justice Cardwell restated the general principles which have long been applied in determining the admission of evidence:

> 'Greater latitude is allowed in the presentation of evidence where it is purely circumstantial than would be admissible where it is sought to establish the contention upon direct and positive testimony. In the recep-

tion of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to elucidate the transaction and to come to a satisfactory conclusion. However remote or insignificant a fact may be; if it tends to establish a probability or improbability of a fact in issue, to make it more or less probable, it is admissible.' 3 Cyc. p. 110.

Instructions

"The defendant objected to Commonwealth's instructions 6 and 7 (T. 1006, 1007).

"Authority for instruction 6 may be found in *Longley* v. *Commonwealth*, 99 Va. 807, 811, 37 S.E. 339, 341 (1900) and in many other Virginia cases.

"Instruction 7 was approved in *Nelson* v. *Commonwealth*, 153 Va. 909, 923, 150 S.E. 407, 411 (1929)

"These instructions have been approved without the additional qualifying phases the defendant sought. Moreover, they must be considered along with instructions given for the defendant, particularly instructions 10, and 14.

"The Court refused instruction A offered by the defendant. *Sims* v. *Commonwealth*, 134 Va. 736, 756, 115 S.E. 382, 389 (1923), see also *Ferrell* v. *Commonwealth*, 177 Va. 861, 872, 14 S.E. 2d 293, 297 (1941).

"The other objections to the instructions were directed to the sufficiency of the evidence and will be considered in the next section of this memorandum.

Sufficiency of the Evidence

"The defendant has raised the issue of the sufficiency of the evidence by motions to strike, objections to the granting of any instructions for the Commonwealth, and specifically instruction 8, and in his motion to set aside the verdict of the jury.

"Principles governing the proof of the corpus delicti by circumstantial evidence are stated in *Bowie* v. *Commonwealth*, 184 Va. 381, 388, 35 S.E. 2d 345, 348 (1945). The

law pertaining to the proof required to establish that the accused is the criminal agent may be found in *Smith* v. *Commonwealth*, 185 Va. 800, 820, 40 S.E. 2d 273, 282 (1946), and the leading case of *Dean* v. *Commonwealth*, 73 Va. (32 Gratt.) 912, 914 (1879) furnishes principles for the evaluation of circumstantial evidence that are applicable to this case.

"The death of Jackson by the criminal agency of another has been established. His body was identified (T. 429, 431-437). It was found covered with brush (T. 420). His head had been beaten (T. 474), his hands bound (T. 467). Death was attributed to a bullet wound in the head (T. 473) from a .38 caliber ball (T. 809).

"The evidence also is sufficient to sustain the verdict of the jury finding the defendant guilty of the crime. He left Norfolk, alone, ostensibly to play in an orchestra in Washington, on January 11, 1959 between 5:30 p.m. and 6:00 p.m. in the evening (T. 544, 987). No one testified that he kept his engagement. The defendant, in answer to an inquiry by Glenn Moser, said he got someone else to play for him (T. 547).

"Jackson was last seen alive driving his family from his father-in-law's home at 9:40 p.m. that same night (T. 384, 385). The distance from his own home was about fifteen miles (T. 383). His empty car was found the next day on the highway about midway between the two houses (T. 386). About 10:00 p.m. a car pulled away from the place where the Jackson car was later found (T. 397-404).

"From Commonwealth Exhibits 15 and 16 (T. 370-376) the jury could conclude that the defendant had the time and opportunity to travel from Norfolk to the place where the Jackson car was found in the interval from the time that he left Norfolk till sometime shortly after 9:40 p.m. From these exhibits the jury also could find the defendant had the time and opportunity to deposit the bodies of the Jackson family at the two places where they were found (T. 422, 512), and arrive in Hyattsville near Washington about 10:30 in the morning of the next day (T. 967-969, 972). Neither the Commonwealth nor the defendant

presented any direct evidence of where the defendant was from the time he left Norfolk until he arrived at his parents' home.

"The principal evidence linking the defendant with the crime was a .38 caliber revolver (Com. Ex. 9) and extra revolver plastic grips (Com. Ex. 39 and 40). The gun and grips had been sold to the defendant in 1957 (T. 829-852). The gun was found in the home of the defendant's parents (T. 795). It contained minute traces of human blood (T. 928). The grips were found near the body of Jackson (T. 627-649, 674-680), and near his broken glasses (T. 636). No other set of extra grips was produced in evidence.

"George A. Berley, an expert from the F.B.I. laboratory, testified that in his opinion the right grip (Com. Ex. 40) had been on the gun (Com. Ex. 9) (T. 938, 939). He also testified that in his opinion the screw holding the grip was broken when the butt of the gun had been used forcefully against some object (T. 939) and that the grip was marked and chipped by the same use (T. 942-944).

"During argument on the motion to set aside the verdict, counsel for the defendant attacked the testimony of this witness charging that at times he said he used the grip to produce similar markings to those that he found on the grip (T. 936 and 948). On occasion the witness did use the word 'grip' interchangeably with the word 'butt.' An examination of his entire testimony however reveals that there was sufficient evidence for the jury to find that his tests were made by comparing the markings on the metal butt with the markings on the plastic grip and that the grip had indeed been on the gun (T. 932-965). The defendant also contends that the marks could have been made on the grips after they and the gun were delivered to the F.B.I. It should be observed that there is no evidence to support this supposition. The defendant also complains that the testimony of the witness was equivocal and speculative. The credibility of the witness and the weight to be accorded his testimony were proper matters for the consideration of the jury. The Court finds that his evidence as a matter of law is not insufficient to sustain the verdict. Indeed, his evidence is convincing.

"From the evidence linking the gun and grips, and the evidence of the bullet hole in Jackson's head and the wounds he had about his head, from the proximity of the grips to his broken glasses and his body, the jury could fairly infer that the gun (Com. Ex. 9) was the weapon that killed Jackson. Furthermore, the jury could infer that the defendant had the means of committing the crime, that he alone possessed the gun and grips. Indeed there is no evidence that anybody else but the defendant had them after 1957.

"The jury could find that the mark of Rees' gun—in the form of its right grip—was left at the scene of the crime, just as the jury in *Dean v. Commonwealth*, 73 Va. (32 Gratt.) 912, 922 (1879) could find that the mark of the famous Francisco gun was left on a fence rail.

"Evidence also was introduced concerning the defendant's appearance on January 12, 1959 and his conduct later. When he appeared to teach a music student he looked disorderly and sloppy in contrast to his usual neat appearance. He was unshaven and his clothes gave the appearance that he had slept in them (T. 606, 607). Evidence to the contrary was presented by the defendant's parents and employer (T. 970, 974, 976, 981), thus raising a question of credibility for the jury. Moser testified that when he accused the defendant of the crime, he made no denial (T. 551).

"The defendant also contended someone else committed the crime. This issue was presented to the jury under instruction 11. In his argument to set aside the verdict the defendant urges that Moser could be the guilty person. This defense presented a question for the jury. It does not render the verdict insufficient as a matter of law. It should be observed that Moser and another witness testified he was in Norfolk during the evening of January 11, 1959 (T. 546, 562, 578), and a witness for the defendant testified he was not there that evening (T. 988). The jury resolved this conflict. There was no evidence that Moser ever had the gun or grips.

"The defendant contends that the Commonwealth failed

to prove a motive, failed to prove that he even knew the Jacksons. The difficulty with this argument is twofold.

"First, proof of motive is not required to sustain a conviction of murder. *Ferrell* v. *Commonwealth*, 177 Va. 861, 873, 14 S.E. 2d 293, 298 (1941).

"Secondly, the evidence showed the Jackson family were together in their car when last seen alive. The jury could infer from the medical testimony that Jackson was killed first, two to five hours after his last meal (T. 480) and Mrs. Jackson was killed later, six to ten hours after her last meal (T. 666). Jackson's body was found relatively close to the location of their car. Mrs. Jackson's body was found in Maryland. A button from Mrs. Jackson's coat was found in a shack not far from her grave (T. 519, 609, 751) (Com. Ex. 33 and 38). She had a peculiar harness around her neck (T. 657, 658, 671), her knees were bruised (T. 661). The jury could conclude that the motive for Jackson's death was the abduction of his wife.

"The Court is of the opinion that the evidence was sufficient to support the jury's verdict.

"Mr. Justice Buchanan's concise statement of the law in *Orange* v. *Commonwealth*, 191 Va. 423, 435, 61 S.E. 2d 267, 272 (1950) is appropriate to this case:

> 'Is it sufficient also to support the finding of the jury that the defendant was the criminal agent?
>
> 'The case of Dean v. Commonwealth, 32 Gratt. 912, 73 Va. 912, has long been recognized as a classic on the subject of circumstancial evidence. The familiar principle was there stated that circumstancial evidence must always be scanned with great caution and never justifies a verdict of guilty unless the circumstances are of such character and tendency as to produce upon a fair and unprejudiced mind a moral conviction of the guilt of the accused beyond all reasonable doubt. Added, however, was the caution that crimes are sometimes committed with such secrecy that to require the production of an eyewitness would be to defeat public justice and to permit the most heinous crimes to go unpunished. It was there stated:

"Where all the circumstances of *time*, *place*, *motive*, *means*, *opportunity* and *conduct*, concur in pointing out the accused as the perpetrator of the crime, it must produce a moral, if not absolute, certainty of his guilt." 73 Va. at page 924. And when these concur, 'the evidence is powerfully strengthened by the total absence of any trace or vestige of any other agent. 1 Stark 494. 73 Va. at page 926.' "

Writ of error denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

Petitioner replies to the brief of respondent in opposition to the petition for a writ of certiorari, as follows:

I. This Court Has Never Decided Whether the Contents of a Container Made Secure Against Entry and Placed in The Custody of Another Are Constitutionally Protected Against Search Without Warrant or Consent of the Owner, and the Decisions of the Federal Circuits and States Are in Conflict on the Point.

Respondent's brief, like the opinions of the trial courts which it quotes at length, misconceives the principal issue in the case. The issue is not, as characterized by respondent, ". . . whether or not a husband and wife (petitioner's parents in the instant case) may validly consent to a search of the premises of their own home. . . ." Br. at p. 14. The

issue is whether these parents may validly consent to the forcible entry and search of a closed and locked container rightfully on their premises, where the container does not belong to them and they have not been given the means of legitimate access to it.

Restated, the issue is whether the fourth amendment guarantee of the right to be secure in one's "effects" extends to property which one has attempted to make secure other than on his own person or premises. Respondent argues that there was no violation of petitioner's fourth amendment rights at the threshold of his parents' home but fails to deal with the violation at the hasp of petitioner's padlocked accordion case.

Respondent has attempted to draw factual distinctions in the six lower court decisions cited by petitioner. *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955); *Sartain* v. *United States*, 303 F. 2d 859 (9th Cir. 1962), *cert. denied*, 371 U.S. 894; *United States* v. *Blok*, 88 App. D.C. 326, 188 F. 2d 1019 (1951); *State* v. *Zuehlke*, 239 Wis. 411, 300 N.W. 746 (1941); *United States* v. *Eldridge*, 302 F. 2d 463 (4th Cir. 1962); *State* v. *Evans*, 45 Hawaii 622, 372 P. 2d 365 (1962). However, respondent has not obscured the fact that none of the cited cases is distinguishable from the instant case on the *essential issue*. Each of those decisions, like the decision below in the instant case, dealt with a search and seizure of personal property secured by the owner in a closed container in the custody of another, the search being made without warrant or consent of the owner but with the consent of the person having custody of the container. Three of the cases, *Holzhey*, *Blok* and *Evans*, held that the constitutional rights of the owner were violated. The other three, *Sartain*, *Zuehlke* and *Eldridge*, like the decision below in the instant case, held that the constitutional rights of the owner were not violated.

The *Holzhey* case held that a woman defendant's fourth

amendment rights could not be waived by her son-in-law and daughter in whose garage a locked cabinet containing her personal belongings had been placed. In attempting to distinguish *Holzhey*, respondent has adopted the grounds recited by the lower federal and Virginia courts, *i.e.*, that "the search was conducted in an area of the premises set aside for the defendant's exclusive use and for which she paid rent," *United States* v. *Rees*, 193 F. Supp. 849, 854 (D. Md. 1961), and "the defendant was currently renting and occupying the premises." *Rees* v. *Commonwealth*, 203 Va. 850, 865, 127 S.E. 2d 406, 416 (1962). See br. at pp. 6, 11, 12-13. These purported grounds of distinction fly in the face of express language of the court in *Holzhey* adopting the findings of its trial court that the "appellant did not reside in or rent the garage area" and that the homeowners "had exclusive control and possession of that part of the premises." *Holzhey* v. *United States*, 223 F. 2d 823, 826 (5th Cir. 1955).

Respondent also attempts to distinguish the instant case from *Holzhey* and *Evans* on the ground that here the accordion case was not known to be the property of petitioner. Br. at pp. 11, 14. The important thing, of course, is that it *was* known *not* to be the property of the only person from whom the government agents had consent to search it (T. 118). Moreover, the only reason the agents were interested in searching the case was on the theory that it belonged to petitioner (T. 95).

It is quite clear from respondent's treatment of all six cases cited by petitioner that distinctions can be drawn only if the principal issue in this case, common to all of them, is ignored. The fact is that the cases are in conflict among themselves and with the instant case on an important point which has never been decided by this Court—whether the contents of a secured container not on the person or

premises of the owner are constitutionally protected against search without warrant or consent of the owner.

II. Petitioner Was Condemned to Death by a Jury Which Was Necessarily Influenced by Inadmissible and Prejudicial Evidence Permeating Extensive Pre-Trial Publicity.

Respondent challenges the propriety of consideration by this Court of any of the published materials cited by petitioner in appendix A to the petition. Br. at pp. 2, 19. No contention is made by respondent that any of the citations are inaccurate, or that any of the articles cited were not in fact published and circulated in Spotsylvania County. Respondent's sole contention is that this Court should ignore the materials cited in appendix A because they were not cited to the trial judge or reproduced and placed in the record.

Petitioner does not take the position that the trial judge was aware of each and every one of the newspaper articles cited in appendix A. However, petitioner does state that the trial judge was fully aware that extensive reference had been made to inadmissible evidence in pre-trial publicity. The fact of actual publication of the materials in appendix A is easily verified. It has not been denied by respondent. If the fact of publication of these hundreds of newspaper articles be granted, it is inconceivable that the trial judge could have been oblivious to the publicity. Moreover, the record specifically reflects that he was aware of it:

> "[T]he Court recognizes that you have read and heard about this case, it has been on the radio and television and in the newspapers. . . ." (T. 289)

Repeatedly, witnesses and prospective jurors testified before the judge that they had seen and heard pre-trial

newspaper, radio and television reports (T. 9, 29, 33-34, 37, 42, 48, 49, 51, 178, 180-81, 183, 193, 204, 207-08, 224, 228, 237, 246, 253, 276, 293, 310, 325, 337-38, 352). Repeatedly during voir dire of prospective jurors, the judge made reference to pre-trial publicity (T. 179, 180, 183-84, 202, 207, 220, 224, 228, 237, 243, 251, 276, 289, 293, 310-11, 324, 337, 349, 352-53, 363). So thoroughly did the aura of prejudicial pre-trial publicity pervade the proceedings that for counsel to have compiled for the trial court a list of citations similar to that compiled for this Court in appendix A would have been belaboring the obvious. The fact is that the trial judge, fully aware of the extensive pre-trial publicity given to inadmissible evidence, nonetheless concluded that petitioner's constitutional rights were not violated by trial before a jury which had been exposed to such evidence so long as each juror stated that he did not have a "fixed opinion" as to guilt (*E.g.*, see T. 181, 202, 220, 228-29, 289-90).

The purpose of appendix A is not to enlarge the record. It is, rather, to acquaint this Court with a situation of which the trial court was well aware—that the locale of this trial had been saturated with highly prejudicial publicity. The purpose of appendix A, in other words, is to enable this Court to see the background against which the trial court made its decision on petitioner's motions for a change of venue or venire. A court does not and cannot function without reference to the fund of information common to all intelligent men in the community. For this Court to examine the holding of the trial court without reference to the type of information contained in appendix A would be to review a distorted image of the trial court's decision.

Moreover, even without the roots in the record of the articles cited in appendix A, precedent for consideration by this Court of published material neither cited to the trial court nor reproduced in the record may be found in *Texas*

& P. Ry. Co. v. *Pottorff*, 291 U.S. 245, 254 (1934). The Court there took judicial notice of certain issues of the *American Banker's Journal* and the *Commercial and Financial Chronicle* as well as of the *New York Times Index*, published reports of the Comptroller of the Currency, 52 treatises on banks and banking practice and the annual proceedings of the American Bankers Association. In *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 69-72 (1961) (dissent), four members of this present Court considered and discussed articles not reproduced and placed in the record which had appeared in the *Chicago Daily News*, *Chicago Tribune*, *New York Times*, *Collier's*, *Life*, *Chicago Magazine* and *Films in Review*. See also *Kennedy* v. *Mendoza-Martinez*, 83 S. Ct. 554, 576 (1963) (ten *New York Times* articles); *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 47, 59 (1962) (letters from Secretary of Interior); *National A.A.C.P.* v. *Button*, 83 S. Ct. 328, 340 (1963) (statistic from issue of *Southern School News*); *Kesler* v. *Department of P.S.*, 369 U.S. 153, 173 (1962) (statistics from House Subcommittee hearings); *Fay* v. *New York*, 332 U.S. 261, 275, 298 (1947) (statistical table published by Bureau of Census).

In its brief, respondent also points to the fact that in *Irvin* v. *Dowd* a petition for direct review of the state conviction on writ of certiorari had been denied "without prejudice to filing for federal habeas corpus." Br. at p. 21. Implicit in the observation is a suggestion that the Court withhold review of petitioner's state conviction until he, too, has followed the habeas corpus route.

The *Irvin* case, of course, represents the exception rather than the rule. This Court decides many more cases involving state criminal convictions on review of state court judgments than on petition for review of collateral federal habeas corpus proceedings. Reitz, *Federal Habeas Corpus:*

Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 473 (1960). Moreover, to force petitioner into a collateral attack on his state conviction in the federal courts would be to introduce a prejudicial issue not present on direct review. Since petitioner is still technically in the custody of the United States (R. 201) serving a term of life imprisonment, his attempt to follow the well-trodden paths of precedent in habeas corpus actions by utilizing that writ to attack the constitutionality of his state conviction and death sentence would almost certainly be met with opposition based on the fact that the object of his suit would not be total release from custody. *Cf. McNally* v. *Hill*, 293 U.S. 131 (1934). While petitioner believes that the Great Writ would be broad enough to encompass his case, it is obvious that the path of habeas corpus for him would be beset by serious perils with possible irrevocable consequences.

Finally, there is no assurance that petitioner, an indigent person (R. 4, 54, 199) dependent on appointed counsel or on the generosity of family and friends, would in a federal habeas corpus action be able to muster sufficient funds to compile photostatic copies of the hundreds of newspaper articles cited in appendix A in order to make the kind of record which respondent seems to think he should have made in the state trial court. It is even doubtful if petitioner would have a constitutional right to the assistance of counsel. See *United States ex rel. Wissenfeld* v. *Wilkins*, 281 F. 2d 707, 715 (2d Cir. 1960).

Conclusion

This case presents issues of great constitutional importance relating to search and seizure and fair trial. Both issues are sharply defined and all facts necessary for their determination are before the Court. The petition for writ of certiorari as to both issues should be granted.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term 1961

No. 720

MELVIN DAVIS REES, JR.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated February 18, 1963, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above-mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

* Post, Appendix A.

PRIOR PROCEEDINGS

On September 28, 1961, petitioner was found guilty by a jury in the Circuit Court of Spottsylvania County of murder in the first degree, and his punishment was fixed at death. His subsequent motion to set aside the verdict was overruled and judgment was entered on the verdict on January 4, 1962. A petition for writ of error to the judgment of conviction was denied by the Supreme Court of Appeals of Virginia on October 8, 1962. See *Rees* v. *Commonwealth*, 203 Va. 850, 127 S. E. (2d) 406. The case is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on January 4, 1963.

STATEMENT OF FACTS

The material facts in the case at bar are fully set forth in the opinion of the trial court, which was subsequently adopted as the opinion of the Supreme Court of Appeals of Virginia and appears as Appendix B to the petition for writ of certiorari. See, *Rees* v. *Commonwealth, supra;* Petition for Writ of Certiorari, p. 21. To the extent that it is consistent with the above-mentioned opinion, the statement of the case set out in the petition for writ of certiorari is accepted by the respondent *with the exception* of those matters contained in Appendix A of said petition to which reference is made on pages 5, 6 and 7 of the petition. As counsel for the respondent will subsequently emphasize in Argument II of this brief, *none of the material embraced in Appendix A to the petition for writ of certiorari was offered in evidence, has heretofore been considered by any court or constitutes a part of the record in this case.*

QUESTIONS PRESENTED

I. Was evidence obtained as a result of a search of the home of petitioner's parents properly admitted at the trial of petitioner?

II. Did the trial court properly decline to grant petitioner's motion for a change of venue or venire?

ARGUMENT

I.

Evidence Obtained As a Result of a Search of the Home of Petitioner's Parents Was Properly Admitted at the Trial of Petitioner

In his opinion in the trial court, the Honorable John D. Butzner, Jr., then Judge of the Circuit Court of Spottsylvania County (now Judge of the United States District Court for the Eastern District of Virginia), discussed at length the question presented by petitioner's motion to exclude evidence obtained by agents of the Federal Bureau of Investigation following a search of the home of petitioner's parents—and the factual complex out of which that question arose—in the following statement (203 Va. at 862-866; 127 S. E. (2d) at 415-17):

> "The defendant moved to exclude evidence which was obtained by agents of the Federal Bureau of Investigation in a search of his parents' home. On September 1, 1961, the Court heard testimony, and on September 14, 1961 counsel presented excellent written briefs and argued the motion (T.57-157).
>
> "The Court excluded papers found in the home (Com. Ex. 9a-14 for identification). Admitted into evidence were the gun which the agents found (Com. Ex. 9), and the case in which the gun and papers were found (Com. Ex. 8).
>
> "'On January 24, 1960 F.B.I. agents called at the home of the defendant's parents. The agents advised

them that their son was under arrest in Memphis, Tennessee, on a warrant charging unlawful flight to avoid prosecution in Maryland. The agents asked for permission to search the house and after some discussion permission was granted in writing by Mr. Rees (Com. Ex. 1) and orally by Mrs. Rees. Mr. Rees also assisted by supplying the agents with a light bulb for the attic.

"In the attic the agents noticed a hole cut through the rear of a closet leading to a crawl space. There they found a suitcase, or an accordion case, which they brought downstairs and showed to Mr. Rees. It contained the name, address, and phone number of Dennis J. Werber. Mr. Rees disclaimed any knowledge of the case or of Mr. Werber. He consented to the agents opening the case. This they did by means of a pliers and a screwdriver, since it was secured by a hasp and lock.

"In the case the agents found a gun, which was one of the specific items for which they were looking. They also found a number of papers. Mr. Rees permitted the agents to remove the case and its contents and took a receipt.

"The defendant did not regularly occupy the home in which his parents lived. He claimed to use it as a base of operation but he had not lived there with any frequency or regularity in the last two years. He had not paid any room or board since 1958 except for a small sum paid in the spring of 1960. Whether this was for current or past board was not definitely stated. When the defendant did visit his parents he was treated as a guest. He used whatever part of the premises at that time was most convenient for him to use. He had no regular room or quarters. He did not exclusively occupy and use the attic, or even the crawl space where the case was found. Other members of the household and their guests, from time to time, used various rooms in the house and also the attic. The defendant's father, testified he had cut the opening in

the closet to the crawl space many years before, and he used the crawl space for storage of his belongings.

"The defendant testified he placed the locked case in the crawl space. He retained the key. He admitted ownership of the case and of its contents."

* * *

"The defendant bases his motion upon *Mapp* v. *Ohio*, 367 U. S. 643 (1961) which holds '* * * all evidence obtained by searchers and seizure in violation of the Constitution is, by that same authority, inadmissible in a state court.'

"The issue of the reasonableness of the search is in the first instance for the determination of the trial court. Each case must be decided on its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U. S. 56, 63 (1950).

"The first circumstance to consider is whether the home of Mr. and Mrs. Melvin Davis Rees, Sr., was also the home of the defendant. The Court finds that it was not. His contention that the home was used as his base of operation is without merit. He was a mature man, living with another woman in the apparent relationship of husband and wife. He had established, from time to time, homes in different cities. He was not a regular occupant of his parents' home. No room or quarters were his. Other people used the same room and quarters that he used when he visited his parents. At the time of the search he was living in a distant city. When he did come to his parents' home his status has been clearly described by his father as a 'welcome guest' (T. 132). In short, by every consideration and test common to ordinary usage and meaning, the home which the agents searched was the home of Mr. and Mrs. Melvin Davis Rees, Sr., and not the home of the defendant.

"The Court further finds that the consent to the search was freely and intelligently given by both Mr. and Mrs. Melvin Davis Rees, Sr. There was no actual

or implied coercion. The agents practiced neither trickery nor fraud.

"The accordion case which was found in the attic was in the possession of Mr. Melvin Davis Rees, Sr. The Court finds that he did not claim either the case or the gun were his son's (T. 67, 68, 118). His consent to have it opened was freely given (T. 68). He consented to the removal of the case and its contents after he had an opportunity to inspect them (T. 69).

"The Court finds that the search was not exploratory. The search was not broader than the consent which authorized it. The agents were looking for specific objects connected with the Jackson crime including the gun they found in the case (T. 75, 77, 83, 95, 96).

"The defendant cites *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955). The facts in that case differ from those in the case at bar. There evidence was introduced that the defendant was currently renting and occupying the premises and this was coupled with the testimony of an agent that he was put on notice of the defendant's claim to the cabinet which was searched. There, nothing was in the record to indicate that the officers had previous knowledge a crime had been committed. The defendant also relies on *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956). This case is not inconsistent with the holding in the case at bar.

"A number of courts have considered the effect of a parent's consent on the legality of a search and seizure. In *Morris* v. *Commonwealth*, 306 Ky. 349, 208 S. W. 2d 58 (1948) the defendant was charged with murder. A cartridge case was found in the defendant's home. The father consented to a search of the house in which the defendant lived. The evidence was found in the kitchen which was under control of the father. The Court held that consent given by the head of the house, or the person in charge of the house, renders competent the evidence.

"In *People* v. *Galle*, 153 Cal. App. 2d 88, 314 P. 2d 58 (1957) the defendant's mother, at the request of the police, consented to a search of her home. The officers found narcotics in her son's coat pocket. The Court held that the evidence was admissible.

"In *Tomlinson* v. *State*, 129 Fla. 658, 176 So. 543 (1937) an officer told the defendant's father they would like to go in his son's room. The father consented. The officer found a pair of shoes. These were properly admitted in evidence.

"In *State* v. *Hagan*, 47 Idaho 315, 274 P. 628 (1929) a mother consented to the search of a barn on her premises. There the officers found stolen property. The Court held that the evidence was admissible since the search was not unreasonable.

"In *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951) *cert. denied*, 342 U. S. 868 (1951) a motion was made to suppress evidence obtained in a search of defendant's luggage while he was in jail. The luggage was seized and searched in a hotel room of a woman who thought she was the defendant's wife. The agents' entry and search was by her consent. The court held the motion to suppress the evidence thus obtained was rightfully denied for the defendant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession.

"In *Woodard* v. *United States*, 102 App. D. C. 393, 254 F. 2d 312 (1958) *cert. denied*, 357 U. S. 930 (1958) a householder took in without rent two boys, one of whom was her grand-nephew. She discovered among other articles several guns. She called the officers and invited them to search. It was held that this search was not unreasonable.

"The Court is of the opinion the search in the case at bar was not unreasonable.

"A very helpful annotation on this question may be found in 31 A.L.R. 2d 1078.

"The gun, which the Commonwealth contends was

the weapon used to commit the crime, was an appropriate object of seizure. Section 19.1-84(5) Code of Virginia 1950."

Moreover, as his counsel point out,* petitioner was tried and convicted in February, 1961, in the United States District Court for the District of Maryland of kidnapping the wife and older daughter of the victim of the homicide for which petitioner was found guilty in the instant case. See, *United States* v. *Rees*, 193 F. Supp. 849. Considering the identical question presented in the case at bar, the Honorable Roszel C. Thomsen, Chief Judge, commented upon the propriety of the same search and seizure, and the admissibility of the evidence sought to be excluded by petitioner, in the following language (193 F. Supp. at 852-854):

"The evidence taken at that hearing showed that on the afternoon of June 24, 1960, the day defendant was arrested in Memphis, Tennessee, a number of agents of the F. B. I. visited the home of defendant's parents in Hyattsville, told them of their son's arrest and said that the agents would like to search the house. Appropriate written authority was given by defendant's father, with the oral approval of defendant's mother. It was a two story house, with an attic reached by a pull-down ladder. There were one or two spare rooms on the second floor, which were occupied from time to time by the children and grandchildren of Mr. and Mrs. Rees, Sr., on visits, and some of defendant's clothes may have been in one of the second floor rooms.

"The search included the third floor attic room, in which various household goods belonging to Mr. and Mrs. Rees were stored along with old school books, etc., belonging to defendant and the other children. An open closet in the attic contained similar material.

*Petition for Writ of Certiorari, p. 5.

In the lower rear wall of the closet one of the agents noticed that the wall had been cut permitting entry into a dark crawl space over the rafters. A flashlight showed a number of items at the far end of this crawl space. One of the items was an old case, which later proved to be an accordion case but looked like a suitcase, padlocked and bearing a tag on which was written "Dennis J. Werber, 811 Delafield Place, N.W., Wash. 11, RA 6-0532." When the case was discovered, the agents asked Mr. Rees if he knew anything about it. He said that he didn't know whose it was, that he had never seen it in the possession of his son, that he did not know Dennis J. Werber, and could not account for its presence "back in this uninhabited portion" of his house. Mr. Rees agreed that it should be opened. It was opened by the agents and was immediately seen to contain a .38 Colt Cobra revolver and a mass of obscene material, including pictures of scantily clad women with penciled drawings added showing their arms tied, etc. Mr. Rees looked over some of the material, said that he had never seen the gun before, and, when asked if it belonged to his boy, answered, not to his knowledge. He said nothing at all about the other material. Mr. Rees consented that the material be taken away by the F. B. I. for further examination and was given a proper receipt. When examined by the F. B. I., the material was found to include an account of the Jackson kidnapping and murder written by defendant in his own handwriting, illustrated with pictures of Mrs. Jackson and Susan taken from a newspaper, with a gag drawn in pencil over Mrs. Jackson's mouth. The account was partly in the first person, extremely brutal and obscene, and contained some details which had never been published in any newspaper.

"Soon after opening the case the F. B. I. called the telephone number shown on the tag, which proved to be the home of Werber's parents. Werber was no longer living there, but his address was obtained and

he denied ownership of anything contained in the case, saying that he had agreed to sell the accordion and case to defendant, but when defendant did not pay for it he had tried to get them back.

"At the hearing on the motion, defendant stated that the case was his, having been sold to him along with an accordion by Werber, although he had never paid for it. He said that he had used it for a while to carry the accordion and for a while to carry clothes while he and Pat Routt were traveling around the country with an orchestra in which he was playing. He said that he had visited his parents' home for a couple of days in the Spring of 1960 while he and Pat Routt were living in an apartment in Washington, before they went to Memphis. He also said that one of those days had been spent preparing the obscene material and that he had stored the whole mass, including the gun, in the case and placed the case in the back of the crawl space. He had said nothing to his parents about it.

"Defendant had a key to his parents' home and could come and go as he pleased. However, he had stayed in the house only two nights during 1960 and had last lived there regularly in the Fall of 1958. Since that time he had been living at various places with Pat Routt, who was not welcome in his parents' home. When he stayed at their house he used several different rooms, including rooms on the second floor and the attic. Those rooms were also used by other members of the family."

* * *

"It was the home of Mr. and Mrs. Rees, Sr., and they had the right to authorize the search of the entire house. No part of the premises had been set aside for the defendant's exclusive use. Calhoun v. United States, 5 Cir., 172 F. 2d 457, certiorari denied 337 U. S. 938, 69 S. Ct. 1513, 93 L. Ed. 1743; Cutting v. United States, 9 Cir., 169 F. 2d 951; Woodard v.

United States, 102 U. S. App. D. C. 393, 254 F. 2d 312; Fredericksen v. United States, 105 U. S. App. D. C. 262, 266 F. 2d 463.

"The search of the case was not unreasonable. The only indicia of ownership was the tag, bearing a name unknown to the owners of the house, with no indication that the case belonged to defendant. It had been left in a crawl space without the knowledge of the owners of the house. Mr. Rees did not know to whom the case belonged; it might have been placed there by him or for him and then forgotten, or it might have been abandoned by a previous occupant of the house. Under the circumstances, Mr. Rees had the right to authorize the F. B. I. to open the case.

"To support a contrary ruling, defendant relies upon Holzhey v. United States, 5 Cir., 223 F. 2d 823. But there the search was conducted in an area of the premises set aside for the defendant's exclusive use and for which she paid rent, and involved a cabinet which was known to be the property of the defendant. Defendant also argues that the case and its contents were in his constructive possession. I find they were not. Such technical considerations of property law are not controlling, Jones v. United States, 362 U. S. 257, 266, 80 S. Ct. 725, 4 L. Ed. 2d 697; the question is whether the search was unreasonable, Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399; United States v. Abel, 2 Cir., 258 F. 2d 485, affirmed 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668, rehearing denied 362 U. S. 984, 80 S. Ct. 1056, 4 L. Ed. 2d 1019; Harman v. United States, 4 Cir., 210 F. 2d 58; Smith v. United States, 103 U. S. App. D. C. 48, 254 F. 2d 751, certiorari denied 357 U. S. 937, 78 S. Ct. 1388, 2 L. Ed. 2d 1552.

"Having lawfully opened the case, the agents had the undoubted right to seize any instruments of a crime which they were investigating or the fruits of such a crime. Abel v. United States, 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668, rehearing denied 362

U. S. 984, 80 S. Ct. 1056, 4 L. Ed. 2d 1019; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; United States v. Thomson, 7 Cir., 113 F. 2d 643, 129 A. L. R. 1291; United States v. Lerner, N. D. Cal., 100 F. Supp. 765. In view of the report they had received from the Medical Examiner of Virginia and the pistol grips which had been discovered near Carroll Jackson's body, the F. B. I. were looking for a .38 Colt revolver. They even knew the range of serial numbers probably on the revolver used in the crime.

"The search was not unreasonable, and the agents were entitled to seize the revolver."

In light of the foregoing summaries, it is manifest that both State and Federal courts have given exhaustive consideration to the initial question sought to be presented by the petition for writ of certiorari. In each instance, the court found the search in question to be reasonable and the evidence lawfully seized and properly admitted without violation of any constitutional right of the petitioner. Nothing but the redundant or the superfluous could be added by counsel for the respondent to the dispositive observations of Judge Butzner and Chief Judge Thomsen.

Moreover, an analysis of the cases relied upon by petitioner in an attempt to establish a conflict between the decision in the instant case and decisions of other State and Federal courts upon the search and seizure question conclusively reveals that no such conflict exists. The initial decisions cited by petitioner in this connection are *Holzhey* v. *United States*, 5 Cir., 223 F. (2d) 823, and *Sartain* v. *United States*, 9 Cir., 303 F. (2d) 859. The decision in the *Holzhey* case was expressly distinguished on its facts, not only by the trial court in the case at bar, *Rees* v. *Commonwealth*, *supra*, at 805, 127 S. E. (2d) at 416 (ante, p.

6), but also by the United States District Court for the District of Maryland in *United States* v. *Rees*, *supra*, at 854 (*ante*, p. 11). In addition, the decision in *Holzhey* was also expressly distinguished on its facts by the United States Court of Appeals for the Ninth Circuit in *Sartain* v. *United States*, *supra*, in the following language (303 F. (2d) at 862-863):

> "Here we have a situation where a defendant delivers his briefcase and the means of access to it to another, thereby voluntarily surrendering to a large degree his right of privacy. Upon defendant's being arrested and charged on a closely related offense, the person then in control of the bag forwards it through intermediaries to the police. The police, with probable cause for a search, and with reason to believe that control of the bag had been surrendered to the persons who turned it in, conduct a search. The search turns up, not general evidentiary materials, but objects subject to immediate forfeiture and seizure—the very instrumentalities of the crime. *We cannot say of this activity, as was said in Holzhey v. United States, 223 F. 2d 823 (5th Cir. 1955), that it was unreasonable under the circumstances.* In Holzhey, *unlike the instant case*, the defendant had never given the means of access to her possessions to another, she was not being detained on any charge at the time the search was made, and the people in charge of the property did not request the police to investigate and take possession." (Italics supplied).

Clearly, the *Holzhey* and *Sartain* decisions are not in conflict—either with each other or with the case at bar. Even less relevant are the decisions in *United States* v. *Blok*, D.C.Cir., 188 F. (2d) 1019, and *State* v. *Zuehlke*, 239 Wis. 111, 300 N. W. 746. Surely, the question of whether or not a government employee's superior may val-

idly consent to the search of a desk which has been assigned to the exclusive use of the employee in a government office building is not even remotely similar to the question of whether or not a husband and wife (petitioner's parents in the instant case) may validly consent to a search of the premises of their own home, of which premises they are the sole occupants.

Equally unprofitable for petitioner's purpose are *United States* v. *Eldridge*, 4 Cir., 302 F. (2d) 463, and *State* v. *Evans*, 372 P. (2d) 365. In the *Eldridge* case, the United States Court of Appeals for the Fourth Circuit held that a bailee in lawful possession of an automobile owned by his bailor could validly consent to a search of the automobile—a decision which is both irrelevant to the case at bar and in no way inconsistent with the decision of the trial court. In the *Evans* case, the Supreme Court of Hawaii held that a wife in joint occupancy and control of premises with her husband could validly admit police officers to the house, but could not consent to a search of her husband's personal effects to discover jewelry hidden in a cuff link case in a bedroom bureau drawer. Not only is *Evans* manifestly distinguishable upon the ground that the dwelling searched in the case at bar was not the petitioner's home nor was he an occupant thereof, but the Court itself *expressly distinguished by name* the factual situation there under consideration from that which obtains in the case at bar. In this connection, the Court pointed out (372 P. (2d) at 372):

> "The cuff link case opened by the officers clearly was identifiable as the husband's and we do not have here the situation where, at the time of search, it does not appear whose case is being opened. Cf., United States v. Rees, D.C., 193 F.Supp. 849, 852."

Finally, decisions involving the application of Fourth Amendment prohibitions to a governmental search without warrant of packages in first class mail, *Ex parte Jackson*, 96 U. S. 727, or to a similar search of leased premises in the absence of the tenant with consent of the lessor, *Chapman* v. *United States*, 365 U. S. 610, are too obviously foreign to any issue in the case at bar to merit discussion.

In light of the foregoing, counsel for respondent submit that the decision in the case at bar upon the question of search and seizure is thoroughly consistent with applicable decisions of this Court and is not in conflict with those of other State or Federal courts.

II.

The Trial Court Properly Declined to Grant Petitioner's Motion for a Change of Venue or Venire

In his opinion in the trial court, the presiding judge considered at length the question posed by petitioner's motion for a change of venue or venire—and the factual complex in which that question was presented—in the following discussion (203 Va. at 859-861; 127 S. E. (2d) at 412-414):

> "The defendant moved for a change of venue or a change of venire (T. 7-55). In support of these motions he filed one affidavit and called five witnesses.
>
> "The affidavit was given by the publisher of the *Free Lance-Star*, a newspaper published in Fredericksburg, Virginia. It states the circulation of the paper and the amount of news coverage pertaining to the case. No claim was made by the defendant and no evidence was introduced that the articles in the newspaper were inflammatory, prejudiced, or biased against the defendant. There was no evidence that the articles were anything other then factual news accounts. This is not sufficient to warrant a change of venue or a

change of venire. *Hampton* v. *Commonwealth*, 190 Va. 531, 58 S. E. 2d 288 (1950), *cert. denied*, 339 U. S. 989 (1950).

"In the opinion of some of the defendant's witnesses an undisclosed number of people in the county were of the opinion that the defendant was guilty. It further appeared that this opinion was based primarily upon what some of the people had read in the newspapers and heard on the radio. One of the witnesses expressed the opinion that the defendant could not receive a fair and impartial trial in the county.

"There was no evidence introduced of mass prejudice against the defendant, of mob action, or threat of such action. There was no evidence of inflammatory newspaper editorials or interviews, or provocative radio or television commentaries. There was no evidence that it was the predominant belief in the county that the defendant was guilty. There was no evidence that it was the predominant belief among the people of the county that the defendant could not receive a fair and an impartial trial.

"The Commonwealth introduced the evidence of three witnesses. The gist of this testimony is that the defendant could receive a fair and impartial trial in the County. The attorney for the Commonwealth advised the Court that he had summoned thirty-two additional witnesses who were present and ready to testify. He stated, however, that their evidence would be cumulative. The Court indicated that it did not wish to hear cumulative evidence because the issue on the motions should be decided on the evidence presented and not on the number of witnesses called to testify for one party or the other.

"The lack of hostility and prejudice is not difficult to understand. Jackson's death occurred almost thirty months before the hearing on the motions. It is well established that the Court must look to conditions at the time of the trial and not the conditions at the time

of the homicide. *Evans* v. *Commonwealth*, 161 Va. 992, 170 S. E. 756 (1933).

"Interest, agitation, and apprehension concerning the case had diminished over the intervening years. Moreover, the Jackson family were not residents of Spotsylvania County. They lived in Louisa County and there was no evidence to indicate that they were closely related or well known in Spotsylvania County. Nor was the defendant known in Spotsylvania County.

"Throughout the trial there was no indication of any hostility, prejudice, bias or mob action against the defendant. Often the small courtroom was not filled. During the latter stages of the trial, particularly when it was expected that the defendant's witnesses would testify, more spectators appeared at the courthouse than could be accommodated in the courtroom. The majority of these spectators were women and they appeared to be present out of curiosity. There were no demonstrations of any kind against the defendant—either inside or outside the courtroom."

* * *

"The jury was selected on September 18th and during the morning of September 19th. The Court previously had ordered additional jurors to be drawn and summoned so seventy-five jurors would be in attendance. Several presented evidence of ill health, and they were excused. A number of farmers qualified upon the *voir dire* examination, but upon suggestion of defense counsel claimed their right of exemption. At the end of the first day, the panel was exhausted, but nineteen veniremen had qualified under the examination of the Court and the searching examination of counsel.

"The defendant thereupon renewed his motions which the Court overruled pointing out that a panel of twenty jurors and four alternates would have been selected had it not been for the exclusion of farmers who claimed their exemption. The Court thereupon

caused to be summoned twenty-five additional jurors for attendance upon the Court the next day. From these the panel of twenty was completed and four alternates were selected, all of whom were qualified jurors.

"The defendant cites *Irvin* v. *Dowd*, 366 U. S. 717 (1961). The facts in that case are so different from the case at bar that it is not decisive of the issues here. There the build-up of prejudice was clear and convincing. Here there is no evidence of prejudice.

"Some veniremen stated they had formed some impression or opinion from what they had read in newspapers, or heard on television and radio. This alone is not a reason for disqualification, *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961), *Ballard* v. *Commonwealth*, 156 Va. 980, 999, 159 S. E. 222, 229 (1931).

"No juror who was selected had a fixed opinion which repelled the presumption of innocence. The defendant did not object to the inquiries which the Court made on *voir dire*, nor did the defendant except to rulings of the Court concerning the qualifications of the jurors."

* * *

"The Court is of the opinion that nothing concerning the background, circumstances, or trial of this case justified granting the defendant's motion for a change of venue or venire."

Once again, counsel for the respondent feel that little of substance can be added to the exhaustive disquisition of the trial court upon the question sought to be presented by this segment of the petition for writ of certiorari. However, in light of the matters contained in Appendix A to said petition, one aspect of the trial court's opinion must be emphasized.

In this connection, it should be noted that (1) in support

of his motion for a change of venue or venire, petitioner filed only one affidavit and called five witnesses (2) the affidavit merely stated the circulation of the local newspaper and the amount of news coverage pertaining to the case and (3) there was no evidence whatever of inflammatory newspaper editorials or interviews, or of provocative radio or television commentaries. See, *Rees* v. *Commonwealth*, *supra*, at 850, 127 S. E. (2d) at 412-413 (ante, pp. 15-16). However, in Appendix A to the petition for writ of certiorari, counsel for petitioner have apparently attempted to catalogue various newspaper articles relating to the instant case, which articles allegedly appeared in newspapers published in Washington, D. C., and Richmond, Virginia, in addition to those which allegedly appeared in the local newspaper. The compilation also contains what purports to be excerpts from the articles listed or descriptive summaries of their contents. *None of the above-mentioned material embraced in Appendix A to the petition for writ of certiorari was offered in evidence in this case, none of it has been considered by any court during the prior judicial proceedings in this case and none of it is a part of the record in this case or available for consideration by this Court.* Manifestly, the bulk of petitioner's argument upon this aspect of the petition for writ of certiorari is predicated upon matters which have no foundation in the record.

In any event, the decisions relied upon by petitioner furnish no support for the contention that his constitutional right to a fair trial was infringed by the court's refusal to grant a change of venue or venire in the case at bar. In this connection, petitioner's glancing reference to *Marshall* v. *United States*, 360 U. S. 310, is appropriately brief. In that case, newspaper articles prejudicial to the accused were read by a substantial number of jurors during the course

of the trial, a circumstance necessitating interruption of the trial for examination of such jurors by the presiding judge. Moreover, the decision in *Marshall* was not impelled by constitutional considerations but was distinctly posited upon this Court's "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. . ." Id., at 313.

Irvin v. *Dowd*, 336 U. S. 717, was expressly distinguished by the trial court in the instant case in the following language (203 Va. at 861, 127 S. E. (2d) at 414):

> "The defendant cites *Irvin* v. *Dowd*, 366 U. S. 717 (1961). *The facts in that case are so different from the case at bar that it is not decisive of the issues here.* There the build-up of prejudice was clear and convincing. Here there is no evidence of prejudice." (Italics supplied).

The factual variance referred to by the trial court is easily demonstrable. In *Irvin* (1) the accused's trial took place within twelve months of the date of the first of the six murders there in question (2) the accused was granted one change of venue because of widespread and inflammatory publicity concerning the crimes (3) curbstone opinions concerning the accused's guilt and the punishment he should receive were openly solicited on the streets and broadcast on local stations (4) voir dire examination of prospective jurors consumed four weeks time prior to trial (5) 370 prospective jurors (some 90% of those examined) entertained an opinion as to the accused's guilt (6) eight out of twelve jurors finally placed in the jury box thought the accused was guilty before hearing any testimony (7) a pattern of deep and bitter prejudice against the accused was shown to be present throughout the community.

In striking contrast is the situation here under consideration. In the case at bar, (1) petitioner's trial did not take place until some 2½ years after the homicide with which he was charged (2) interest, agitation and apprehension concerning the case had diminished during the intervening years (3) the victim of the homicide and his family were not residents of Spottsylvania County nor was there evidence that they were closely related or well known in the county (4) the petitioner was not known in Spottsylvania County (5) a panel of twenty qualified jurors and four alternates was selected from a total of 100 persons summoned for jury duty, and would have been selected from the initial venire of 75 persons summoned had it not been for the exclusion of certain farmers who claimed their exemption (6) no juror who was selected had a fixed opinion which repelled petitioner's presumption of innocence (7) no pattern of hostility, passion or prejudice against the petitioner existed at the time of his trial.

Clearly, the trial judge correctly determined that the factual situation in the *Irvin* case was so different from that which obtained in the case at bar that the decision in the former case was not decisive of the issues here. In addition, that decision can hardly be considered procedural precedent for the granting of a writ of certiorari in the instant case. In *Irvin*, this Court initially denied direct review by certiorari "without prejudice to filing for federal habeas corpus" after exhausting State remedies, 353 U. S. 98, and the Court's decision in that case was rendered following a grant of certiorari to a judgment by the United States Court of Appeals for the Seventh Circuit in habeas corpus proceedings adjudicating the Fourteenth Amendment (fair trial) claim adversely to the accused.

In light of the foregoing, counsel for the respondent sub-

mit that no constitutional right of the petitioner was infringed by the trial court's refusal to grant a change of venue or venire in the case at bar.

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court – State Library Building
Richmond 19, Virginia

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C

February 18, 1963

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond 10, Virginia

RE: REES v. VIRGINIA

No. 720, October Term, 1962

Dear Sir:

A petition for writ of certiorari was filed in this Court on January 4, 1963 in the above-entitled case, and my records indicate that you were served with a copy of the petition on or about January 4, 1963.

I have been directed by the Court to request that you file a response to such petition and 40 copies of your response, with service, should reach this office on or before March 20, 1963.

Very truly yours,

JOHN F. DAVIS, Clerk
By /s/ E. P. Cullinan
Chief Deputy

EPC: jmh
cc: S. White Rhyne, Jr., Esquire
515 Southern Building
Washington 5, D. C.

Office-Supreme Court, U.S.
FILED
MAY 10 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 720

MELVIN DAVIS REES, Jr., *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

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IN THE

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No. 720

MELVIN DAVIS REES, Jr., *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *Respondent.*

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of April 15, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia in the above-entitled case as prayed for in the petition filed herein on January 4, 1963.

Reasons for Granting Rehearing and Issuing the Writ

In asserting unlawful search and seizure, petitioner's primary contention is and has been that his father was incompetent to consent to entry of the locked accordion case because it was not his father's case and he had not been given the means of legitimate access thereto. Only secondarily has petitioner raised the question of whether, assuming his father's competency to consent, the consent was validly obtained. In this connection, the petition for certiorari

noted obliquely that such consent was "probably vitiated" by misrepresentation on the part of the F.B.I. agents that they could obtain a valid search warrant in the absence of consent. Pet. at p. 12. Since the filing of the petition, however, decisions have issued both from this Court and from lower federal and state courts which warrant a stronger focus on the problem presented in this case of consent based on police misrepresentation.

The record in this case shows conclusively that the purpose of the F.B.I. search was to find evidence to incriminate petitioner (T. 75, 77) and that the agents were looking for any one of a large number of evidentiary objects connected with various crimes which they suspected petitioner of having committed (T. 74, 94-95). No indication appears in the record of any cause to believe that any specific object was actually in the house, and in fact only one such object was actually found (See T. 83). The most that can be said to establish cause for the search is that petitioner was suspected of crime and was known to have frequented the house in the past. Even this cause, weak as it is, was so remote in time from the search as to be legally insubstantial, for petitioner had been in Memphis, more than 900 miles from the searched premises, for the two and a half months immediately preceding the search (T. 152, 779-80). See *Schoeneman* v. *United States*, No. 17,395, D.C. Cir., Apr. 4, 1963, quoting *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Sawyer*, 213 F. Supp. 38, 40 (E.D. Pa. Jan. 11, 1963).

Had the F.B.I. been forced to rely on search by warrant, it is clear that it could not have demonstrated probable cause. Nonetheless, the record shows that the consent of petitioner's father to search of his house and seizure of petitioner's property was obtained by representing that

a search warrant could be secured if consent were not given. Petitioner's father testified on direct examination (T. 128):

> "Q. Was anything said about the use of a search warrant?
>
> "A. Yes, sir, he mentioned that, that they could get a search warrant if we didn't give them permission; he said it would help them if I would go ahead and sign the release."

On cross-examination of petitioner's father, the Commonwealth's attorney acknowledged that this representation had been made (T. 140):

> "A. I felt they, of course, could get a search warrant.
>
> "Q. They explained that to you, didn't they?
>
> "A. They explained that could be done."

The leading case in this Court dealing with the effect of misrepresentation on consent to search is *Gouled* v. *United States*, 255 U.S. 298 (1921), which held that the misrepresentation vitiated the consent and violated the fourth amendment. However, the *Gouled* case involved not only a fraudulent entry but a secretive seizure.

In *Cleary* v. *Bolger*, 371 U.S. 392 (1963), decided since the filing of the petition for certiorari herein, this Court considered a consent to search obtained by a misrepresentation substantially like the one in this case. In *Cleary*, the police represented to the person whose premises were searched that "the consent form was unnecessary since they already had enough information to warrant a search but that he might as well sign it to save them the trouble." *Id.* at 393.

See also dissent at 405, describing this procedure as "trickery." However, the Court in that decision did not have occasion to decide the question of whether the misrepresentation vitiated the consent, because the case was disposed of on other grounds.

Two lower court decisions, neither one available at the time of filing the petition for certiorari, indicate the frequency with which this point may arise and reinforce petitioner's contention that by reason of misrepresentation no valid consent to search was obtained. In *Villano* v. *United States*, 310 F. 2d 680, 681-82 (10th Cir. Nov. 5, 1962), not reported until after the petition, the court held invalid consent to search obtained by authoritarian means, including the misrepresentation that the police could validly proceed without warrant. In *Commonwealth* v. *Wright*, 31 U.S.L. WEEK 2532 (Pa. Apr. 16, 1963), the court held invalid consent of a wife to search of the apartment where she and her husband lived, where the police misrepresented that her husband had confessed and had sent them to receive contraband narcotics from the apartment.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Appeals of Virginia.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in rule 58 of this Court.

S. WHITE RHYNE, JR.,
Counsel for Petitioner.